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## APPENDIX

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# In the Supreme Court of the United States

OCTOBER TERM, 1978

Nos. 78-329, 78-330

FRANCIS X. BELLOTTI, ATTORNEY GENERAL OF THE  
COMMONWEALTH OF MASSACHUSETTS, ET AL.,  
APPELLANTS IN NO. 78-329,

AND  
JANE HUNERWADEL,  
APPELLANT IN NO. 78-330

v.

WILLIAM BAIRD ET AL.,  
APPELLEES IN NOS. 78-329, 78-330

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

Volume I  
Docket Entries, Pleadings, and Opinions

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*Appeals Docketed August 25, 1978*

*Jurisdiction Noted October 30, 1978*

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# United States District Court District of Massachusetts.

WILLIAM BAIRD; MARY MOE I;  
GERALD ZUPNICK, M.D.; PARENTS  
AID SOCIETY, INC.; and all  
others similarly situated,  
PLAINTIFFS,

v.

FRANCIS X. BELLOTTI, Attorney General  
of the Commonwealth of Massachusetts;  
GARRETT BYRNE, District Attorney of the  
County of Suffolk; their agents, successors,  
those acting in concert with them, and all  
others similarly situated,

DEFENDANTS,

CIVIL ACTION  
No. 74-4992-F

JANE HUNERWADEL, individually and  
on behalf of all others similarly situated  
and, further, as next friend of her minor  
daughters who are of childbearing age and  
are or may become pregnant, and all others  
similarly situated,

DEFENDANT-INTERVENOR.

Docket Entries

1974

October

- 30 Complaint filed, request for  
TRO, three-judge court.
- 30 Summons issued.
- 31 Affidavit of notice and  
service filed.
- 31 Motion for leave to have  
out-of-state counsel appear  
Pro Hac Vice FILED.
- 31 Application for temporary  
restraining order FILED.
- 31 Memorandum of law FILED.
- 31 FREEDMAN, J. Hearing on  
plaintiff's motion for  
temporary restraining order  
and request for three-judge  
court; arguments; Court  
directs the convening of a  
three-judge court and  
further directs that the  
requested temporary  
restraining order be entered.

1974

October

31      FREEDMAN, J. ORDER  
ENTERED . . . that  
defendants are hereby  
enjoined from enforcing the  
parental consent requirement  
of the Mass. Abortion Law,  
Gen. Laws, ch. 112, sec.  
12P, pending further order  
of this court.

November

6      Designation of three-judge  
court - Judge Aldrich, Judge  
Julian, Judge Freedman.  
13     Ds' motion to dismiss and/or  
for summary judgment and  
motion for a more definite  
statement FILED with cs.  
13     Notice of deposition of  
WILLIAM BAIRD, FILED with cs.  
13     Notice of deposition of MARY  
MOE I and MARY MOE II, FILED  
with cs.

November

13     Notice of deposition of  
GERALD ZUPNICK, FILED with  
cs.  
14     JUDGES ALDRICH, JULIAN,  
FREEDMAN - Three-judge court  
hearing on continuation of  
temporary restraining order;  
after arguments; plaintiffs'  
motion to add additional  
party plaintiffs, allowed  
(affidavits of Mary Moe III  
and Mary Moe IV to be filed  
with the Clerk and  
impounded). Prospective  
motion of parents to  
intervene as defendants will  
be allowed, if filed, by a  
single justice. It is  
ordered that dissolution of  
temporary restraining order  
is denied; (Judge Anthony  
Julian, dissenting).  
Memorandum of defendants in

November

- 14 support of their motion to dismiss and/or for summary judgment, FILED. Hearing on preliminary injunction scheduled for Dec. 9, 1974, at 10:00 a.m.
- 19 Interrogatories propounded by defendants to plaintiffs pursuant to Rule 26(b) (4) (A) (ii) FILED with cs.
- 19 Ds' motion to compel plaintiffs to answer interrogatories regarding their expert witness by November 29, 1974, FILED with cs.
- 19 Motion to intervene as defendants (Parents) FILED with cs.
- 19 Defendant-Intervenors' Answer and Counterclaim FILED with cs.

November

- 20 FREEDMAN, J. Re motion to intervene - "Motion to intervene allowed. Motion to impound will be acted upon by the three-judge court." cc/cl.
- 29 Motion for leave to appear of Brian Riley in behalf of intervenors FILED. cs.

December

- 4 Appearance of Robert Reynolds in association with Mary Welby as counsel for intervenors.
- 9 P's motion to join all district attorneys in Commonwealth as members of defendant class and to extend injunctive restraints to all said defendants FILED with cs.
- 9 P's motion to vacate order allowing intervention FILED with cs.

December

- 9 Memorandum of law in support  
of motion to vacate order  
allowing intervention FILED.
- 9 Ps' motion to certify  
plaintiffs' classes FILED.
- 9 Memorandum of law in support  
of motion to certify class  
action FILED.
- 9 Motion of the Civil Liberties  
Union of Massachusetts and  
the Planned Parenthood  
League of Massachusetts for  
leave to file a brief Amici  
Curiae FILED.
- 9 Memorandum of interveners in  
opposition to plaintiffs'  
request for a preliminary  
injunction FILED with cs.  
ALDRICH, C.J., JULIAN, S.D.J.
- 9 FREEDMAN, J. Motion of Mary  
T. Welby Esq. for leave to  
appear on behalf of  
intervenors ALLOWED. Motion

December

- 9 to join all District  
Attorneys in Commonwealth as  
members of defendant class  
and to extend injunctive  
restraints to all said  
defendants, ALLOWED. Motion  
of Civil Liberties Union of  
Mass. and the Planned  
Parenthood League of Mass.  
for leave to file a brief of  
Amici Curiae, ALLOWED.  
Hearing on plaintiff's  
motion for preliminary  
injunction; evidence;  
testimony; continued to  
Monday, December 30, 1974 at  
10:00 a.m. for further  
hearings pursuant to  
F.R.C.P. 65(a) (2) injunctive  
relief and merits.

December

- 9 FAGAN, DEP. CLERK Re motion of the Civil Liberties Union of Massachusetts and the Planned Parenthood League of Mass. for leave to file a brief Amici Curiae - "ALLOWED". cc/cl.
- 9 FAGAN, DEP. CLERK Re motion to join all district attorneys in Commonwealth as members of defendant class - "ALLOWED". cc/cl.
- 13 Defendants' motion in opposition to plaintiffs' motion to vacate order allowing intervention, and in opposition to plaintiffs' motion to certify plaintiffs' class FILED with cs.
- 13 Defendants' memorandum in support of their motion in opposition to plaintiffs'

1974

December

- 13 motions to vacate this Court's order of intervention, and to certify plaintiffs' classes FILED.
- 13 Defendants' motion to dismiss plaintiff's complaint as to Mary Moe II as a result of her failure to attend deposition FILED WITH CS.
- 13 Memorandum of interveners in opposition to plaintiffs' motion to vacate order allowing intervention FILED with cs.
- 19 Letter dated Dec. 19 from Plaintiffs' counsel requesting two hour in camera hearing.
- 23 Defendants' motion requesting the court to take additional testimony during a day in late January FILED with cs.

1974

December

- 30 ALDRICH, C.J., FREEDMAN,  
D.J., JULIAN S.D.J. three  
judge court hearing on  
plaintiff's motion for  
preliminary injunction  
consolidated with merits;  
evidence; defendants request  
for disclosure, filed.  
Stenographic transcript of  
proceedings on December 7,  
1974 filed.
- 31 ALDRICH, C.J., FREEDMAN,  
D.J., JULIAN S.D.J. Hearing  
on plaintiffs motion for  
preliminary injunction;  
evidence; luncheon recess;  
In Camera hearing witness,  
Mary Moe I. Court orders  
testimony at In Camera  
hearing be impounded,  
plaintiff, plaintiff rests;  
case continued to January  
28, 1975 at 10 a.m. 1974

December

- 30 Court reporter's transcript  
of proceedings of December  
7, 1974.

1975

January

- 7 FREEDMAN, J. ORDER ENTERED  
. . . . The Court orders  
that all briefs that parties  
desire to file in this case  
shall be filed with the  
Clerk of Courts by January  
28, 1975. cc/cl.

- 24 Letter dated January 23, 1975  
from Interveners attorney  
stating corrections in  
Interveners Motion to  
Intervene and Answer.

- 27 Court reporter's transcript  
of proceedings December 30,  
1974.

- 27 Court reporter's transcript  
of proceedings December 31,  
1974

January

- 27 Interveners' brief in opposition to plaintiffs' complaint for declaratory and injunctive relief FILED with cs. (Copies delivered to Judges Julian and Aldrich).
- 28 Appearances of Brian Riley and Mary Laura Russell as counsel for intervenors.
- 28 Appearance of John Mahoney II as counsel for D.A. Garrett Byrne FILED.
- 28 FREEDMAN, J. Hearing on plaintiff's motion for preliminary injunction continued from December 31, 1974; defendants' evidence; defendants' brief filed; evidence; TAKEN UNDER ADVISEMENT.

1975

February

- 18 Court reporter's transcript of proceedings of January 28, 1975 FILED.
- 19 Copy of recent decision by U.S. District Court for district of Colorado filed by Mr. Lucas.
- 26 DEPOSITIONS OF DR. G. ZUPNICK & WILLIAM BAIRD.
- 26 Copy of decision re Planned Parenthood of Central Missouri vs Danforth et al received.

April

- 28 ALDRICH, D.J. AND FREEDMAN, D.J. Opinion filed.
- 28 JULIAN, D.J. Dissenting opinion filed.
- 28 ALDRICH, D.J. AND FREEDMAN, D.J. ORDER ENTERED . . . In accordance with our opinion of April 28, 1975, Section P

1975		1975	
April		May	
28	of Mass. G.L. c. 112, and such other portions of the chapter insofar as they make specific reference thereto are hereby declared to be unconstitutional and void, and defendants are enjoined from enforcement thereof. cc/cl.	9	G.L. 112 and such other portions of the chapter insofar as they make specific reference thereto are hereby declared to be unconstitutional and void and defendants are enjoined from enforcement thereof. cc/cl.
29	Copy of Opinion, Dissenting opinion and Order to West Publishing, Mass Lawyers Weekly, NCAIR and Opinion book, U.S. Law Week and Administrative Office of the U.S. Courts.	16	Appearance of Michael Eby, Asst Atty General for defts filed.
May		16	Notice of Appeal to the Supreme Court of the United States re: defts.
9	ALDRICH, D.J., FREEDMAN, D.J. SUBSTITUTE ORDER ENTERED . . . in accordance with our opinion of April 28, 1975, Sec. 12P of Mass.	20	Notice of Appeal to the Supreme Court of the United States re: deft-intervenor filed.

June		July	
20	Certified copy of Docket entries and original pleadings forwarded to the United States Supreme Court. 1975	6	pending the certification of state law questions to the Supreme Judicial Court FILED CS.
November		12	Letter from the Clerk to Messrs. Lucas and Bellotti, cc Mr. Riley re certification of questions filed.
25	Certified copies of the Orders from the Supreme Court of the United States noting probable jurisdiction in the above entitled cases.	21	ALDRICH, C.J. FREEDMAN, D.J., JULIAN, S.D.J. ORDER entered dissolving injunction. cc/Mr. Lucas, Mr. Rosenfeld and Mr. Riley. Telephone notice to Mr. Rosenfeld and Mr. Lucas.
1976			
July		21	Defendants' proposed questions for certification to the Supreme Judicial Court FILED cs.
6	Application for temporary restraining order and preliminary injunction pending the certification of state law questions to the Supreme Judicial Court FILED.	21	Memorandum of reasons in support of defendants' proposed questions for
6	Memorandum of law in support of application for temporary restraining order and preliminary injunction		

July  
21 certification to the Supreme  
Judicial Court FILED.  
  
\* 19 Letter dated July 19, 1976  
from Judge Freedman to  
Attorney General Bellotti.  
  
21 Letter dated July 21, 1976  
from Attorney General  
Bellotti to Judge Freedman.  
  
30 Plaintiffs' proposed questions  
for certification to the  
Supreme Judicial Court of  
Massachusetts FILED cs.  
  
30 Memorandum in support of  
plaintiffs' proposed  
questions FILED cs.  
  
30 Motion in support of  
defendants' proposed  
questions for certification  
to the Supreme Judicial  
Court FILED cs.  
  
30 Letter dated July 28, 1976  
from Attorney Mary Russell  
to Judge Freedman regarding

July  
30 Judge Freedman's letter of  
July 19, 1976 to A.G.  
Bellotti.  
  
30 FREEDMAN, J. ORDER ENTERED  
. . . Defts and  
intervenors are given  
permission to file a written  
response to the plaintiffs'  
proposed questions for  
certification to the Supreme  
Judicial Court of  
Massachusetts; said comments  
to be filed no later than  
Monday, August 9, 1976,  
cc/cl.1976  
  
30 Memorandum in support of  
plaintiffs' proposed  
questions FILED cs.  
  
30 Motion in support of  
defendants' proposed  
questions for certification  
to the Supreme Judicial  
Court FILED cs.

July

30

Letter dated July 28, 1976  
from Attorney Mary Russell  
to Judge Freedman regarding  
Judge Freedman's letter of  
July 19, 1976 to A.G.  
Bellotti.

30

FREEDMAN, J. ORDER ENTERED  
. . . . Defts and  
intervenors are given  
permission to file a written  
response to the plaintiffs'  
proposed questions for  
certification to the Supreme  
Judicial Court of  
Massachusetts; said comments  
to be filed no later than  
Monday, August 9, 1976,  
cc/cl.

August

4

Certified copy of judgment of  
the Supreme Court, (United  
States) . . . it is  
ordered and adjudged by this

August

4

Court that the judgment of  
the U.S. District Court in  
these causes be and the same  
is hereby vacated . . . .  
and the same are hereby  
remanded to the U.S.  
District Court for the  
District of Mass for further  
proceedings in conformity  
with the opinion of this  
court. It is further  
ordered that the said  
appellants Francis X.  
Bellotti recover from  
William Baird et al,  
\$3,352.80 and Jane  
Hunerwadel recover from  
William Baird \$150.00 for  
their costs herein  
expended. cc/cl., Judges  
Aldrich, Julian.

August

- 4 Defendants' motion to enlarge time for filing a written response to plaintiffs' proposed questions for certification FILED CS.
- 9 Defendant-intervenors motion for enlargement of time for filing a written response to plaintiff's proposed questions for certification filed.
- 11 Intervenor's memorandum partially in opposition and partially in support of plaintiffs proposed questions, filed.
- 26 File returned to Supreme Court, Washington, D.C. at request of Clerk Gulickson per phone call of this date.
- 31 FREEDMAN, J. ORDER ENTERED . . . . the questions having been certified to the

August

- 31 Supreme Judicial Court of Massachusetts this day, it is hereby ordered that all briefs to the Supreme Judicial Court in support of the respective parties; positions should be filed with the Supreme Judicial Court no later than noon-time of Monday, September 20, 1976. cc/cl.
- 31 Certified questions and covering letter sent to Chief Justice Hennessey.
- 31 Copies to file, the Three Judge Court and counsel (without covering letter.) Original of certified questions impressed with the seal of the Court.

October

21 Letter dated Oct. 18 from Supreme Court of the U.S. stating . . . "The Court today entered the following order in the above-entitled case: The motions to vacate order entered by Mr. Justice Brennan on July 30, 1976 are denied." Copies to Judges Aldrich, Julian.

1977

January

27 FREEDMAN, J. ORDER ENTERED . . . A HEARING IN THIS THREE JUDGE CASE WILL BE HELD ON Wednesday, Feb. 2, 1977 at 9:30 a.m. in Courtroom 3 on the 12th Floor on the sole issue as to whether or not a stay of enforcement of § 12P of MGL c. 112, inserted by St. 1974, c. 706, § 1 shall be

January

27 placed in effect, pending a resumption of a hearing on the merits. Copies to Judges Aldrich, Julian, counsel.

February

2 FREEDMAN, J., ALDRICH, J., JULIAN, J. three judge court hearing on sole issue re "stay of enforcement of 12P of M.G.L. c. 112 . . . pending a resumption of a hearing on the merits; plaintiff's motion for leave to file first amended complaint, filed.

2 Memorandum of law in support of motion to amend, filed. First amended complaint in class action, received for filing. Intervenors' memorandum in support of an order denying a stay of

February

- 2 enforcement of G.L. c. 112,  
Sec. 12P filed. Parties to  
file briefs by Feb. 7, 1977  
at 10 a.m.; UNDER ADVISEMENT.
- 7 Defts' memorandum in  
opposition to plaintiffs'  
request for preliminary  
injunctive relief FILED CS.  
Copies to Judge Aldrich,  
Julian, Freedman.
- 7 Motion of the Civil Liberties  
Union of Mass. the Planned  
Parenthood League of Mass.  
Crittenden Hastings Clinic  
and Preterm, for leave to  
file a brief Amici Curiae  
FILED CS.
- 7 Brief of the Civil Liberties  
Union of Mass. the Planned  
Parenthood League of Mass.  
Crittenden Hastings Clinic  
and Preterm Amici Curiae  
filed.

February

- 9 The following impounded  
portions of the record  
returned from the U.S.  
Supreme Court: #4A  
Affidavits impounded; #26  
Portion of the transcript  
starting with page 131  
impounded. Impounded  
materials placed in Dep.  
Clerk Fagan's office.
- 10 ALDRICH, J., FREEDMAN, J.  
OPINION ON MOTION FOR STAY  
ENTERED . . . cc/cl.
- 10 ALDRICH, J., FREEDMAN, J.  
ORDER ENTERED . . .  
following oral arguments and  
consideration of memoranda  
filed by the parties, and in  
accordance with an opinion  
filed this date, the Court  
orders that M.G.L. c. 112,  
§ 12P be stayed until  
further order of the court.  
cc/cl.

February

- 10 JULIAN, J. DISSENT FROM ORDER  
OF THE MAJORITY OF THIS  
COURT ENTERED . . . I  
dissent from the order of  
the majority of the Court  
entered this day which stays  
the enforcement of Mass.  
G.L. c. 112, 12P until  
further order of the Court.  
A statement of the reasons  
for may dissent will  
follow. cc/cl.
- 15 Certified copy of opinion of  
the Supreme Judicial Court,  
Comm of Mass.
- 18 JULIAN, SENIOR DISTRICT JUDGE  
. . . . DISSENTING OPINION  
ON MOTION TO STAY ENTERED  
. . .
- 22 Defendants' answer to  
plaintiffs' first amended  
complaint FILED CS.

February

- 22 Defendants' first set of intg  
to plaintiff William Biard  
FILED CS.
- 24 Copies of Opinion on motion  
for stay and dissenting  
opinion on motion to stay  
forwarded to West, Mass.  
Lawyers Weekly, NCAIR.

March

- 1 Ds' 1st set of interr for  
plaintiff Gerald Zupnick;  
filed. cs.
- 4 P's motion for pretrial  
hearing FILED CS.
- 7 Defendants' notice of  
opposition to plaintiffs'  
motion for pretrial hearing  
FILED CS.
- 8 Defendant Intervenor's answer  
to plaintiffs' first amended  
complaint filed cs.

March

- 9 ALDRICH, S.C.J., FREEDMAN,  
D.J. Conference re  
scheduling (no report)  
Counsel to report in writing  
re scheduling and  
discovery. (counsel present:  
Ms. Schmidt for pltfs', Mr.  
Cole for defts').
- 24 Ds' motion to dissolve prel.  
inj. and for sanctions,  
filed cs.
- 29 Ps' motion for leave to file  
answers and objections to  
ints out of time, filed.  
Copies to Judges Aldrich,  
Freedman and Julian.
- 29 Ps' memo in support of filing  
answers and objections out  
of time, filed. Copies to  
Judges Aldrich, Freedman and  
Julian.

March

- 29 Ps' motion for protective  
order filed cs.
- 30 Motion of Joan Schmidt to  
withdraw filed cs.
- April
- 1 Motion to intervene as party  
plaintiff of Planned  
Parenthood League of  
Massachusetts, Phillip G.  
Stubblefield and Crittenton  
Hastings House & Clinic  
FILED CS.
- 1 Answers and objections to  
interrogatories to plaintiff  
Gerald Zupnick MD FILED.
- 1 Verification of complaint by  
plaintiff William Baird  
filed.
- 1 Verification of answers to  
interrogatories filed.
- 1 Verification of complaint by  
plaintiff Gerald Zupnick MD  
filed.

April

- 1 Verification of answers to interrogatories filed.  
5 Motion of plaintiffs for summary judgment FILED CS.  
5 Memorandum of law in support of motion of plaintiffs for summary judgment.  
5 ALDRICH, C.J., JULIAN S.D.J. FREEDMAN, J. case called for three judge court hearing; pltfs' motion to file answers to intgs late, ALLOWED. Further hearing set for April 13, 1977 on motions to intervene on behalf of pltfs and defts; deft's motion for further answers to intgs and for the scheduling of hearing dates on summary judgment motions.  
7 Deft motion of opposition to proposed intervenors' motion to intervene FILED cs.

April

- 8 Notice of change of appearance of S. Stephen Rosenfeld for defts filed, cs.  
8 Notice of appearance of Thomas R. Kiley for defts filed cs.  
12 Memorandum in support of motion to intervene FILED CS.  
12 Defendants' initial statement of disputed material facts FILED CS.  
13 Opposition of plaintiffs to motion to intervene by proposed plaintiff intervenors. filed cs.  
13 Ds' memo in opposition to proposed intervenors' motion to intervene filed. c/s.  
13 ALDRICH, GCS. JULIAN, S.J. Hearing on Motion of Planned Parenthood of Mass., Phillip Stubblefield, and the

April

- 13 Crittendon Hastings House and Clinic to intervene as party pltffs.; Mm. Henn argues for intervenors; Mr. Lucas for pltffs. in opposition to intervention; Mr. Stokey for Intervenors and Mr. Cole for the Comm. Notice of opposition to intervene filed by Comm; parties to get together and decide what kind of schedule they can agree on, then submit written schedule & perhaps there will be Pre-Trial Conference.
- 14 Appearance of Mr. Balliro as counsel for the plaintiffs, filed. c/s.
- 18 Atty. Roy Lucas's motion to withdraw as counsel for plaintiffs, filed. c/s.

April

- 21 FREEDMAN, J. Motion to withdraw appearance ALLOWED. Copies to counsel.
- 21 FREEDMAN, J. ALDRICH, SCJ, JULIAN, SCJ Motion to intervene of proposed plaintiff intervenors, DENIED, permit proposed intervenors to be recognized as amicci, all copies to Mr. Henn, in the future. Copies to counsel.

May

- 20 Defts' motion to compel plaintiff Zupnick to answer defts Intgs concerning expert witnesses by a date certain filed cs (See entry on Docket #6-date of May 23, 1977).
- 20 Defts' Motion to compel plaintiff William Baird to answer Defts Intgs

May		June
20	concerning expert witnesses by a date certain filed cs. (See entry on Docket #6-date of May 23, 1977)	3 Defts' second set of intgs to plaintiff Gerald Zupnick FILED cs. Defts' second set of intgs to plaintiff William Baird filed cs.
20	Defts' motion to compel plaintiff William Baird to answer their intgs filed cs. (See entry of Docket #6-date of May 23, 1977).	7 Motion for an order compelling plaintiffs to reimburse defendants for the cost of their appeal to the Supreme Court of the U.S. FILED CS.
20	Defts' motion to compel plaintiff Gerald Zupnick to answer their intgs filed cs. (See entry on other side of docket).	14 Defts' initial request for the production of documents by plaintiff William Baird FILED CS.
23	Defts' first set of intgs to plaintiff Willaim Baird FILED CS.	15 FREEDMAN, J. ALDRICH, SCJ, JULIAN, SJ. Order entered requiring ps to comply with Supreme Court of the US dated 8/2/76, filed.
23	Defts' first set of intgs to plaintiff Gerald Zupnick FILED CS.	22 Plaintiffs' first set of intgs to deft Jane Hunerwadel FILED CS.
23	New certificate of service as to filings of May 20, 1977 filed.	

June

22 Plaintiffs' first set of intgs to deft Francis X. Bellotti FILED CS.

22 Answers to defendants' second set of intgs to plaintiff William Baird FILED CS.

22 Answers to defendants' second set of intgs to plaintiff Gerald Zupnick MD FILED CS.

22 Supplementation of answers to intgs to plaintiff William Baird FILED CS.

July

7 Defts' motion for sanctions under F.R.C.P. 37(b) and for an order permitting them to take discovery of plaintiffs' experts by other means FILED CS.

7 Defts' memorandum in support of their motion for sanctions and an order

July

7 permitting them to take further discovery of plaintiffs' experts FILED CS.

7 Affidavit of Garrick F. Cole in support of defendants' motion for sanctions and an order permitting them to take further discovery of plaintiffs' experts FILED CS.

7 FREEDMAN, J. Re deft motion for sanctions. It is ordered that plaintiffs respond to this motion within fourteen (14) days from date of this order.

\*\*\*\*

May

23 FREEDMAN, J. ORDER ENTERED . . . the Court orders that plaintiff Gerald Zupnick answer defts intgs #14 completely on or before June 30, 1977. cc/cl.

<p><b>May</b></p> <p>23 FREEDMAN, J. ORDER ENTERED      . . . the Court orders      that plaintiff Wm. Baird      answer defts' intg #14      completely on or before June      30, 1977. cc/cl.</p> <p>23 FREEDMAN, J. ORDER ENTERED      . . . the Court orders that      Pltf William Baird shall      answer completely and      without further objections      the following of defts      intgs, 2, 4, 9, 19, 11, 12      and 13, (2) pltf William      Baird shall serve and file      his answers to the      interrogatories on or before      June 15, 1977. cc/cl.</p> <p>23 FREEDMAN, J. ORDER ENTERED      . . . the Court orders that      plaintiff Gerald Zupnick      shall answer completely and      without further objection</p>	<p><b>May</b></p> <p>23 the following of defts'      intgs 2, 4, 7 and 8.; and      2. Plaintiff Gerald Zupnick      shall serve and file his      answers to the intgs      ennumerated above on or      before June 15, 1977. cc/cl.</p> <p><b>July</b></p> <p>11 Plaintiffs' response to the      defendant's initial request      for the production of      documents by William Baird      and Gerald Zupnick FILED CS.</p> <p>13 ALDRICH, S.C.J., JULIAN,      S.D.J., FREEDMAN, J. ORDER      ENTERED . . . pre-trial of      above entitled case      scheduled for Monday, August      22, 1977 in Courtroom 3,      12th Fl. at 11:00 a.m. This      will include the scheduling      of trial to follow sometime</p>
--	--

- | July |  | July |  |
|------|--|------|--|
| 13   | <p>in the fall. Accordingly, all pre trial discovery will be completed by Friday, August 19, 1977. This deadline will not be extended unless it becomes clear that one of the parties has not been cooperative in arranging the necessary witnesses for the taking of depositions.</p> <p>cc/cl.</p> | 25   | <p>Deft. responses to p's first set of interrogatories. FILED cs. (See docket #7 for further entries of July 18th and 25th.</p>  |
| 18   | <p>Ps' opposition to defts' motion for sanctions and for an order permitting them to take discovery of plaintiffs' experts FILED cs.</p>   | 18   | <p>Supplementation of answers to intgs to plaintiff Gerald Zupnick FILED cs. Verification of supplemental answers to intgs.</p>  |
| 18   | <p>Second supplementation of answers to intgs to plaintiff Wm. Baird filed cs. Verification of second set of supplemental answers to intgs.</p>  | 20   | <p>FREEDMAN, J. ORDER ENTERED . . . . defts have moved this court permit defts to take further discovery of plaintiffs' expert witnesses . . and to impose sanctions upon plaintiffs . . . . defts' motion to take depositions of plaintiffs experts is allowed. Motion for sanctions denied. cc/cl.</p> |
|      |  | 25   | <p>Stipulation concerning effect of deft discovery and plaintiffs' responses FILED (ASSENTED TO) CS.</p>   |

July

29 Defts' notice of taking deposition of CAROL NADELSON, M.D. FILED CS.

August

1 Defendants' motion for leave to contact members of plaintiff class FILED CS.

1 Defts' motion to shorten time allowed plaintiffs to respond to request for admissions FILED CS.

1 Defts' first set of requests for admissions to plaintiff Gerald Zupnick FILED CS.

2 Defts' motion for an order shortening the period of notice for their motion for sanctions under F.R.C.P. 37 FILED.

2 Affidavit of Michael B. Meyer in support of defts' motion for sanctions under F.R.C.P. 37 filed.

August

2 Defts' motion for sanctions under rule 37 FILED.

2 FREEDMAN, J. Re Defts' motion for leave to contact members of plaintiff class - "DENIED." (after conferring with Julian, J.) cc/cl.

2 FREEDMAN, J. Re defts' motion to shorten time allowed plaintiffs to respond to request for admissions - "ALLOWED." (After consulting with Julian, J.) cc/cl.

2 FREEDMAN, J. (no court reporter) Appearance of Rikki J. Klieman Esq. for plaintiff, filed.

Plaintiffs' opposition to defts' motion for leave to contact member of class, filed. Plaintiffs' motion in opposition to shorten

August

- 2 time to request admissions, filed. Arguments; motion to contact class denied; shorten time for admissions, allowed. Court sets schedule for taking depositions of expert witnesses.
- 8 First amendment to d's first set of requests for admissions to ptf Gerald Zupnick, filed.
- 10 Notice of taking deposition of Joy Dryfoos on 8/18/77, filed. cs.
- 11 Defts' motion for an order permitting this Court's stenographer to provide defendants with a transcript of this Court's hearing on several motions in March 1977 FILED CS.

August

- 11 Defts' fourth motion for sanctions under F.R.C.P. 37 for plaintiffs' failure to respond to discovery under F.R.C.P. 26(b) (4). FILED CS.
- 11 Defts memorandum in support of their fourth motion for sanctions under F.R.C.P. 37 for plaintiffs failure to respond to discovery under F.R.C.P. 26(b) (4) FILED CS.
- 12 P's motion in opposition to defendants' fourth motion for sanctions FILED CS.
- 15 Defts' first supplemental responses to plaintiffs' first set of intgs FILED CS.
- 16 Ps' motion to shorten time allowed Ds and Ds-Intervenors to respond to requests for admissions.
- 16 Ps' motion for a protective order FILED CS.

August

- 16 Ps' first requests for admissions filed.
- 17 Ds' motion for a protective order relieving them of their obligation to respond to plaintiffs' first requests for admissions FILED CS.
- 17 Ds' notice of opposition to plaintiffs' motion to shorten time allowed defendants and defendant-intervenors to respond to requests for admissions FILED CS.
- 17 Ds' notice of opposition to plaintiffs' motion for a protective order FILED CS.
- \*\*\* 16 FREEDMAN, J. Re Ps' motion for protective order - "On the basis of plaintiffs' attempted use of Mrs. Dryfoos' testimony,

August

- 16 plaintiffs motion for a protective order is allowed." cc/cl.
- 19 DEPOSITION OF CAROL C. NADELSON FILED.
- 19 CONTINUED DEPOSITION OF CAROL C. NADELSON FILED.
- 19 Answers of the plaintiff Gerald Zupnick to defts' request for admissions of fact FILED CS.
- 19 Defts' initial pre trial memorandum FILE CS.
- 22 Ds' motion to determine the sufficiency of ps' responses to ds' request for admissions, filed. c/s.
- Ds' memo in support of motion to determine answers, filed. c/s.
- \* 19 Deft-intervenor's objections to request for admissions, filed. c/s.

\*August

- 19 Deft., Jane Hunerwadel's responses to pltff's first set of interrogatories, filed.
- 22 FREEDMAN - JULIAN, D.J. Amici Planned Parenthood memorandum of pre-trial conference, filed. Hearing on pre-trial conference. Court extends discovery re: Dr. Nadelson to Sept. 14. Orders that all outstanding motions are denied. Three-Judge Court non-jury trial Monday, Oct. 17, 1977 at 10:00 a.m.; pre-trial briefs by Oct. 12. (no later than 10/14)

September

- 1 Motion to amend the answers of the plaintiff Gerald Zupnick to defts request for admissions FILED CS.

September

- 1 Ps' response to defts' motion to determine the sufficiency of pltfs' responses to defts' first set of requests for admissions by pltf Gerald Zupnick FILED CS.
- 1 Ps' request to notice facts FILED CS.
- 9 Defts' opposition to plntffs' motion to amend answers of Plntff Zupnick to defts' request for admissions and of defts' opposition to plntffs' request to notice facts, filed. c/s. Copies to Aldrich, C.J., Julian, S.D.J., and Freedman, D.J.
- 14 Third supplementation of answers to ints to plntff Wm. Baird, filed.
- 14 Plntff's motion to enlarge time for the taking of deposition of Joy Dryfoos by the defts, filed.

September

- 14 Deft-Intervenor's Notice of  
Opposition to Plaintiff's  
request to Notice Facts,  
filed, c/s.
- 14 Deft-Intervenor's answer to  
plntffs' first request for  
admissions, filed, c/s.
- 15 Defts' responses to  
plaintiffs' requests for  
admissions, filed.
- 15 Defts' request for allowance  
of their motion to determine  
the sufficiency of plntffs'  
responses to defts' first  
set of requests for  
admissions, filed.
- 21 Defts' motion to strike  
plaintiffs' third  
supplementation of answers  
to interrogatories to  
plaintiff William Baird  
FILED CS.

September

- 21 Defts' motion to strike  
plaintiffs' proposed witness  
Dryfoos FILED cs.
- 21 Defts' opposition to  
plaintiffs' motion to  
enlarge time for the taking  
of the deposition of Ms  
Dryfoos by the defendants  
FILED CS.
- 23 FREEDMAN, J. Re Ps' request  
to notice facts - "DENIED."
- 23 FREEDMAN, J. Re motion to  
enlarge time for the taking  
of the de position of Joy  
Dryfoos by the defts -  
"Allowed until Oct. 5, 1977  
for purpose of defendant  
taking Mrs Dryfoos'  
deposition. No further  
extensions to be allowed.  
Parties to cooperate on a  
date and time for purposes  
of completing this  
deposition." cc/cl.

October

- 5 Affidavit of Michael B. Meyer concerning the deposition of Ms. Joy Dryfoos FILED CS.
- 11 Continued deposition of Dr. Carol C. Nadelson, third day FILED.
- 12 Ps' trial brief FILED CS.
- 13 Intervenor's pre trial memorandum FILED CS.
- 13 Motion of Planned Parenthood League of Massachusetts, Crittenden Hastings Clinic and Preterm. Amicae Curiae to participate in oral argument FILED CS.
- 13 Brief of Planned Parenthood League of Massachusetts, Crittenden Hastings Clinic and Preterm, Amicae Curiae FILED.
- 14 Letter dated Oct. 14, 1977 from Mr. Henn re insertion of wrong name - Phillip G.

October

- 14 Stubblefield MD rather than Preterm.
- 14 Deft's pre trial memorandum FILED CS.
- 17 ALDRICH, C.J., JULIAN, S.D.J., FREEDMAN, J. Affidavit of Joan C. Schmidt and Joseph J. Balliro concerning the deposition of Ms Joy Dryfoos filed.
- Hearing on deft's request to determine the sufficiency of plaintiffs responses to first set of admissions - "all stand admitted until instance by instance showing can persuade otherwise".
- Defts motion to strike plaintiffs third supplementation of answers to intgs of Wm. Baird - "withdrawn". Defts' motion to strike plaintiffs'

October

- 17 proposed witness Dryfoos - withdrawn. Three judge court non-jury trial on the merits begins; evidence; contd to 10/18.
- 18 ALDRICH, C.J., JULIAN, S.D.J., FREEDMAN, J. Three-judge court trial continues - second day; evidence; plaintiffs memorandum of law in support of admission of "11 Million Teenagers" filed. Plaintiff rests; defts evidence; stipulation filed; deft rest. Court directs plaintiff to file within 7 days its arguments of objections to request for admissions; deft has three days thereafter to respond; briefs on the law to be filed three weeks after

October

- 18 court files its rulings on admissions. Further briefs may be requested upon motion.
- 26 Memorandum opposing defts' motion that defendants' request for admissions be deemed admitted FILED CS.
- 28 Defts' memorandum in opposition to plaintiffs' and Amici's motion to exempt certain requests for admissions by Gerald Zupnick from the Court's order of October 17, 1977 FILED CS.
- 31 Amendments to defts' memorandum in opposition to plaintiffs' and Amici's motion to exempt certain requests for admissions by Gerald Zupnick from the Court's order of October 17, 1977 FILED cs.

November

- 1 Court reporter's transcripts  
of proceedings of October  
17th and 19th 1977 filed.
- 10 Letter dated Nov. 9, 1977  
from Asst. Atty. Gen. Meyer  
attaching copy of letter to  
Mr. Balliro dated Nov. 9,  
1977 re: G.L. § 12S.
- 17 Letter dated Nov. 16, 1977  
from Mr. Balliro to Mr.  
Meyer in response to Mr.  
Meyer's letter of Nov. 10,  
1977.
- 18 Copy of letter dated Nov. 17,  
1977 from Mr. Meyer to Mr.  
Balliro.
- 21 Defts' response to the  
Court's order of Nov. 14,  
1977 FILED CS.
- 21 Copy of letter Nov. 18, 1977  
from Mr. Henn to Mr. Meyer  
re Amici's position re § 12S.

November

- 28 Defts' motion for an order  
compelling plaintiffs to  
comply with the Court's  
suggestion of October 19,  
1977 that plaintiffs define  
the relationship between  
their claims and the  
statutes inclusion of  
"minors who are incapable of  
consenting" FILED CS.
- 29 Copy of letter dated Nov. 28,  
1977 from Mr. Balliro to Mr.  
Meyer re MGL c. 112 § 12S.
- 29 ALDRICH, SJC, JULIAN, SDJ,  
FREEDMAN, D.J. Memorandum  
and order entered . . . in  
response to defts' motion  
for compliance filed  
11/28/77 and a review of the  
record, the court agrees  
with defts that Mr. Balliro  
letter of Nov. 16, 1977 is  
not altogether clear. It

**November**

- 29 does find Mr. Henn's letter of Nov. 18 to be clear and adequate. Mr. Balliro is ordered to make further response, within five days of the date hereof.
- 30 Ps' opposition to defts' motion for an order compelling plaintiffs to comply with the Court's suggestion of October 19, 1977 that plaintiffs define the relationship between their claims and the status inclusion of "Minors Who Are Incapable of Consenting".  
Filed cs.

**December**

- 5 Defts' motion to extend time for filing of briefs FILED CS.
- 5 Ps' further response to the order of the Court dated Nov. 29, 1977 FILED CS.

**December**

- 6 FREEDMAN, J. Re motion to extend time for filing of briefs - "ALLOWED". cc/cl.
- 9 Intervenor's post-trial memorandum of law, filed cs.
- 12 Pltfs' post trial brief, FILED. cs.
- 12 Defts' motion to dissolve or in the alternative to modify the preliminary injunction entered by the court on Feb. 10, 1977, FILED.
- 12 Defts' initial post-trial brief, FILED. cs.
- 20 Pltfs' opposition to defts' motion to dissolve or in the alternative modify the preliminary injunction entered by the Court on Feb. 10, 1977, FILED. cs.
- 23 Letter dated Dec. 23, 1977 from Mr. Henn, counsel for amici, stating that Amici

December

- 23 does not intend to file response to defts' post-trial brief FILED CS.
- 29 BY THE COURT, Austin W. Jones Jr. Deputy Clerk ORDER ENTERED . . . . defts have moved to dissolve the preliminary injunction entered by this Court on Feb. 10, 1977 enjoining them from enforcing MGL ch. 112, § 12P or in the alternative, to modify the injunction by enjoining enforcement of the statute only insofar as it applies to mature minors in the first trimester. The Court denies the defts' motion. Judge Julian dissents from this denial.  
cc/cl.
- 29 Amici's motion for leave to file responsive letter to

December

- 29 defts' post-trial brief FILED CS.
- 30 Defts' opposition to the circulation of Amici's letter of Dec. 23, 1977 FILED CS.

1978

January

- 5 For distribution, article entitled "Induced Abortion and Subsequent Outcome of Pregnancy in a Series of American Women." filed.
- 5 FREEDMAN, J. ORDER ENTERED re article received 1/5/78. ". . . all copies of the letter and article submitted . . . and circulated . . . are being returned to counsel and will not be considered by the Court."  
cc/cl.

May

2 ALDRICH, SCJ, FREEDMAN, D.J.  
OPINION ENTERED . . . we  
reaffirm our decision that  
the statute is  
unconstitutional and is to  
be permanently enjoined.  
Pltfs are entitled to costs,  
including recovery of costs  
paid as a result of the  
previous appeal, lost  
because of defts' mistaken  
advocacy. cc/cl.

2 ALDRICH, SCJ, FREEDMAN, D.J.  
ORDER ENTERED . . . in  
accordance with our opinion  
of May 2, 1978, section S of  
M.G.L. c. 112 and such other  
portions of the chapter  
insofar as they make  
specific reference thereto  
are hereby declared to be  
unconstitutional and void,  
and defts are enjoined from

May

2 enforcement thereof. cc/cl,  
West, Mass. Lawyers Weekly,  
NCAIR.

2 JULIAN, S.D.J. DISSENTING  
OPINION ENTERED . . . for  
the reasons stated in this  
and in my previous  
dissenting opinion, I would  
uphold the constitutionality  
of the statute. cc/cl,  
West, Mass. Lawyers Weekly,  
NCAIR.

11 Motion to intervene as party  
plaintiffs of Planned  
Parenthood League of Mass,  
Crittenton Hastings House &  
Clinic and Phillip G.  
Stubblefield FILED CS.

11 Memorandum of Planned  
Parenthood League of Mass et  
al in support of motion to  
intervene filed.

May

- 15 FREEDMAN, D.J. Motion to intervene is allowed without prejudice to the Supreme Court's discretion with respect to oral argument.
- 19 D's motion for reconsideration, filed.  
c/s.
- 22 Ps' motion to vacate order of the court dated May 15, 1978 filed CS.
- 22 Ps' motion in opposition to motion to intervene as party plaintiffs of Planned Parenthood League of Massachusetts, Crittenton Hastings House & Clinic and Phillip G. Stubblefield FILED.
- 22 Memorandum of law in support of plaintiffs' motion in opposition to motion to intervene as party plaintiffs of Planned

May

- 22 Parenthood League of Massachusetts, Crittenton Hastings House & Clinic and Phillip G. Stubblefield FILED CS.
- 22 Letter dated 5/22/78 from Mr. Henn to Clerk Fagan re plaintiff intervenors Planned Parenthood League of Mass et al not opposing the issuance of an order giving the A.G. 7 to 10 days or so to file substantive papers opposing this Court's allowance of the motion to intervene.
- 24 Plaintiff-Intervenors' opposition to plaintiffs' motion to vacate order of May 15, 1978 FILED CS.
- 25 Deft-Intervenor Hunerwadel's motion to correct order FILED CS.

May

25 FREEDMAN, J. ORDER ENTERED . . . by motion dated May 11, 1978 Planned Parenthood et al sought to intervene in this action. The motion was allowed by this individual judge by Order dated May 15, 1978 as inscribed on the face of the motion itself. Said Order of this individual Judge is hereby vacated. The parties are allowed ten (10) days from this date, May 25, 1978 to file any oppositions to the motion to intervene. cc/cl.

June

6 Defts' notice of opposition to Planned Parenthood's motion to intervene FILED CS.  
19 ALDRICH, S.C.J., FREEDMAN, D.J. ORDER ENTERED . . . it is hereby ordered

June

19 that the motion to intervene as party pltfs filed May 11, 1978 by Planned Parenthood, Crittenton Hastings House & Clinic and Phillip G. Stubblefield, be ALLOWED. cc/cl.  
19 JULIAN, S.D.J. (Dissenting) I would deny the motion to intervene. cc/cl.  
21 Defts' request that the Court act upon all outstanding motions filed cs.  
\*\*\* 20 ALDRICH, C.J., FREEDMAN, D.J. AMENDED ORDER ENTERED . . . amending order of May 2, 1978 in accordance with our opinion of May 2, 1978 Section 12S of Mass. G.L. c. 112, and such other portions of the chapter insofar as they make specific reference thereto are hereby declared

June

- \*\*\* 20 to be unconstitutional and void, and defts are enjoined from enforcement thereof.  
cc/cl.
- 22 Pltfs' motion for payment of expert witnesses filed with affidavit in support and cs.
- 26 Defts Bellotti et al Notice of Appeal to the Supreme Court filed. cs.
- 26 Deft-Intervenor Jane Hunerwadel Notice of Appeal to the Supreme Court filed.  
c/s.

July

- 5 D's notice of opposition to P's motion for payment of expert witness, filed. c/s.
- 18 FREEDMAN, J. ORDER ENTERED . . . in accordance with the Court's order of July 20, 1978, pltf has filed a motion for payment of \$450

July

- 18 for expert witness . . . deft has filed a notice of opposition and has offered to pay what it regards as a reasonable fee in the amount of \$214 . . . the Court believes the amount of \$350 is fair and reasonable . . . so ordered. cc/cl.

August

- 2 Certified copy of docket entries and Notices of Appeal forwarded to the U.S. Supreme Court, Washington, D.C.

October

- 30 Certified copy of Order, Supreme Court of the U.S. dated October 30, 1978 . . . "statement of jurisdiction in this case having been submitted and considered by this court,

October

30      probable jurisdiction is noted. The case is consolidated with No. 78-329 and a total of one hour is allotted for oral argument."

United States District Court.  
District of Massachusetts.

[Title omitted in printing]

First Amended Complaint in Class Action for Temporary Restraining Order, Preliminary and Permanent Injunctions, and Declaratory Judgment Against Unconstitutional Requirement of Parental or Judicial Consent for Abortion.

Plaintiffs reallege and incorporate by reference each and every allegation of the original complaint and further state:

1. This is a civil action for a declaratory judgment, a temporary restraining order, preliminary, and permanent injunctions prohibiting enforcement of the parental or judicial consent requirement for a minor's abortion, Gen. Laws, ch. 112,

Sec. 12P, enforced by Defendants, and recently construed by the Supreme Judicial or judicial court of this Commonwealth.

2. The parental consent requirement, as so construed, unconstitutionally restricts the performance of abortions in violation of the principles set out in Planned Parenthood v. Danforth, 428 U.S. \_\_\_\_ (1976); Roe v. Wade, 410 U.S. 113 (1973), Doe v. Bolton, 410 U.S. 179 (1973), and Eisenstadt v. Baird, 405 U.S. 438 (1972).

3. The parental consent rule will inflict grave and irreparable injury upon Plaintiffs and minor women, and must be enjoined, because it burdens, limits, and in many instances precludes access to medical abortion procedures in Massachusetts, arbitrarily discriminates against a single class of medical procedures and

patients, and abridges fundamental personal constitutional rights protected by the Fourteenth Amendment.

## II. JURISDICTION

4. Jurisdiction is conferred by Act of Congress, 28 U.S.C. Sec. 1343(3), 1331, and relief authorized by Sec. 1 of the Enforcement Act of 1871, currently 42 U.S.C. Sec. 1983, and the Declaratory Judgment Act, 28 U.S.C. Sec. 2201.

5. In order to avoid action by Defendants, Plaintiffs must apply to this Court for a temporary restraining order, to prevent grave and immediate irreparable injury.

6. A three-judge district court must hear the prayers for preliminary injunctive relief, as required by 28 U.S.C. secs. 2281, 2284, which were in force when this action was brought.

### III. PARTIES

7. Plaintiff WILLIAM BAIRD is a resident and citizen of the State of New York.

8. Plaintiff MARY MOE was a pregnant minor under the age of 18 when this action was brought, and a resident and citizen of the Commonwealth of Massachusetts.

9. Plaintiff GERALD ZUPNICK, M.D., is a resident and citizen of the State of New York.

10. Plaintiff PARENTS AID SOCIETY, INC., at the time this action originated, was a Chapter 180 not-for-profit corporation organized under the laws of the Commonwealth of Massachusetts, with principal offices at 673 Boylston Street, Boston, Massachusetts. Plaintiff BAIRD was and is an officer and director of the corporation.

11. Defendants are all residents and citizens of the Commonwealth of Massachusetts.

12. This action has previously been certified by the Court as a class action as to the plaintiffs and defendants.

### IV. STATUTORY PROVISION IN QUESTION

13. "Section 12P. (1) If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary ...."

### V. FACTS

14. Plaintiff WILLIAM BAIRD is general director and chief-counselor of a center operated by Plaintiff PARENTS AID SOCIETY, INC., for the purposes, *inter alia*, of providing

contraception, abortion, counseling VD diagnosis and treatment, adoption referral, and other services.

15. Plaintiff MARY MOE was sixteen years of age at the time of filing, in the tenth grade, and about nine weeks pregnant. She was seeking to terminate her pregnancy, and did not want to inform either of her parents.

16. The statute in question would have prevented her from obtaining an abortion without parental or judicial consent, and there-by inflicted grave and irreparable injury upon her.

17. Plaintiff GERALD ZUPNICK, M.D. is a physician licensed to practice medicine in eight (8) states, including Massachusetts and New York. Dr. Zupnick is medical director of the center.

18. Plaintiff Bill Baird has for over ten years been a nationally prominent leader in the social movement to invalidate restrictions on abortion

and birth control services in the United States. He was the successful party in the landmark case of Eisenstadt v. Baird, 405 U.S. 438 (1972). He has lectured on hundreds of college and university campuses, been Clinical Director of Emko Co. (a contraceptive manufacturer), been a special advisor to the New York State Senate Committee on Health, and was founder of Parents Aid Society, the first non-profit abortion/birth control center in the United States.

19. Dr. Zupnick has extensive experience in providing abortion, contraception, and related services on an outpatient basis, and has performed over 8,000 abortions in a non-hospital setting.

20. With Bill Baird as Administrator and Dr. Zupnick as Medical Director, Parents Aid Society, Inc. has endeavored to facilitate access to abortion services with

particular emphasis on helping the poor and very young.

21. The parental or judicial consent requirement, however, threatens the continued activities of Plaintiffs by imposing sanctions upon the treatment of minors without parental or judicial consent.

22. The statute as construed in Baird v. Attorney General, \_\_\_ Mass. \_\_\_, \_\_\_ N.E.2d \_\_\_ (Jan. 25, 1977) (SJC - 763), requires prior notice to parents in every case of judicial proceeding, regardless of probable predictable consequences, and is overbroad.

23. The statute as construed requires that either parent or court take into account only "the best interests" of the minor. This standard is so vague and overbroad as to provide insufficient protection to the minor's constitutionally protected right of privacy.

24. The statute as construed gives final word to a Superior Court judge to determine "that the best interests of the minor will not be served by an abortion," Slip Op. p. 9, and therefore burdens a minor's rights by allowing standardless overriding of a patient's informed consent supported by a medical judgment as to necessity.

25. The statute as interpreted places significant burdens on a minor's access to abortion.

26. Such restraints, unless enjoined, will operate to deny many minor women access to medical care and counseling.

27. Defendants are empowered to and will enforce the statute through civil and criminal sanctions.

28. Injunctive relief is necessary to prevent enforcement.

VI. CLAIMS FOR RELIEF

(1) The parental or judicial consent requirement, as interpreted, is invalid under the Due Process Clause of the Fourteenth Amendment.

(2) The parental or judicial requirement, as interpreted, violates the Equal Protection Clause of the Fourteenth Amendment, particularly in light of Mass. Gen. Laws Ch. 112, §12F.

VII. JUDGMENT REQUESTED

WHEREFORE, PLAINTIFFS RESPECTFULLY REQUEST:

(1) A temporary restraining order prohibiting Defendants from enforcing or otherwise implementing the parental consent requirement of the new Massachusetts abortion law, Gen. Law, Ch. 112 Sec. 12P.

(2) A declaratory judgment that the parental or judicial consent requirement violates the Due Process and Equal Protection Clauses of the

Fourteenth Amendment as interpreted by Planned Parenthood v. Danforth, 428 U.S. \_\_\_ (1977), Roe v. Wade, 410 U.S. 113 (1973), Doe v. Bolton, 410 U.S. 179 (1973), and Eisenstadt v. Baird 405 U.S. 438 (1972).

(3) Preliminary and permanent injunctions prohibiting Defendants from enforcing or otherwise implementing the parental consent requirement.

(4) An order taxing all costs and reasonable attorneys' fees against Defendants, and granting Plaintiffs any other relief deemed necessary, just, or proper.

RESPECTFULLY SUBMITTED:

---

Roy Lucas  
Suite 604  
1055 Thomas Jefferson St., N.W.  
Washington, D.C. 20007  
(202) 338-6955

[Title omitted in printing]

Joan C. Schmidt  
One Center Plaza  
Boston, MA 02108  
(617) 723-1980

ATTORNEY FOR PLAINTIFFS.

Dated: February 1, 1977

DEFENDANTS' ANSWER TO PLAINTIFFS'  
FIRST AMENDED COMPLAINT

Defendants Francis X. Bellotti, Attorney General of the Commonwealth of Massachusetts, and the district attorneys of the Commonwealth (the defendants) respond to the allegations contained in the numbered paragraphs of the first amended complaint as follows:

1. The allegations contained in paragraph one concern the nature of the action and require no answer.
2. The allegations contained in paragraph two are conclusions of law requiring no answer.
3. The allegations contained in paragraph three are a mixture of conclusions of law requiring no answer and factual allegations. Insofar as

the paragraph contains factual allegations, they are denied.

4. The allegations contained in paragraph four are conclusions of law requiring no answer. Further answering, defendants state that neither 42 U.S.C. §1983 nor 28 U.S.C. §2201 confers subject matter jurisdiction on this Court.

5. Defendants deny that their enforcement of the statute would cause plaintiffs "grave and irreparable injury." Defendants admit that, absent an order of this Court invalidating it, they will enforce the statute.

6. The allegations contained in paragraph six are conclusions of law requiring no answer.

7. Admitted.

8. Admitted.

9. Admitted.

10. Admitted.

11. Admitted.

12. The allegations contained in paragraph twelve are conclusions of law requiring no answer.

13. The allegations contained in paragraph thirteen are conclusions of law requiring no answer.

14. Admitted.

15. Admitted.

16. The allegations contained in paragraph sixteen are conclusions of law requiring no answer.

17. Admitted.

18. Defendants lack sufficient knowledge or information to form a belief as to the truth of the allegations contained in the first and third sentences of paragraph eighteen. The allegations contained in the second sentence are admitted.

19. Defendants lack sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph nineteen.

20. Defendants lack sufficient knowledge or information to form a belief as to the truth of the allegations contained in paragraph twenty.

21. Denied.

22. The allegations contained in paragraph twenty-two are conclusions of law requiring no answer.

23. The allegations contained in paragraph twenty-three are conclusions of law requiring no answer.

24. The allegations contained in paragraph twenty-four are conclusions of law requiring no answer.

25. The allegations contained in paragraph twenty-five are a mixture of conclusions of law requiring no answer and factual allegations. Insofar as the paragraph contains factual allegations, they are denied.

26. The allegations contained in paragraph twenty-six are a mixture of conclusions of law requiring no answer

and factual allegations. Insofar as the paragraph contains factual allegations, they are denied.

27. The allegations contained in paragraph twenty-seven are a mixture of conclusions of law requiring no answer and factual allegations. Insofar as the paragraph contains factual allegations, they are denied.

#### FIRST DEFENSE

The complaint fails to state a claim upon which relief can be granted, because:

1. Mass. Gen. Laws Ann. ch. 112, §12P (West Supp. 1976) (the statute) does not violate the due process clause of the Fourteenth Amendment because

a. The statute is properly to protect the best interests of minors and does not infringe upon or unduly burden the constitutional

right of girls under eighteen years of age to have access to competent abortion services; and

b. the statutory decision-making standard of a minor's "best interests" is a well-established legal concept which is neither unconstitutionally vague nor overbroad and whose use by parents and the Superior Court does not adversely affect the constitutional rights of minors who seek either parental consent or judicial authorization to obtain an abortion.

2. The statute when read in conjunction with Mass. Gen. Laws Ann. ch. 112, §12F (West Supp. 1976) does not violate the equal protection clause

of the Fourteenth Amendment because the decision to obtain abortion services is fundamentally different from other patient-initiated medical decisions and the Commonwealth has a compelling interest in permitting minors to consent to the provision of a wide range of medical services without parental consultation while requiring parental consultation in the case of abortions.

WHEREFORE, defendants request that the Court dismiss plaintiffs' amended complaint or, in the alternative, enter judgment in their favor, and allow them their costs.

By their attorneys,  
FRANCIS X. BELLOTTI  
ATTORNEY GENERAL

[Title omitted in printing]

DEFENDANT-INTERVENOR'S ANSWER TO  
PLAINTIFFS' FIRST AMENDED COMPLAINT.

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Dated: February 18, 1977

Defendant-intervenor restates and incorporates by reference each and every defense, response and counterclaim raised in the original answer.

FIRST DEFENSE

The plaintiffs' first amended complaint fails to state a claim upon which relief can be granted because G.L. c.112, sec. 12P, as construed by the Supreme Judicial Court of the Commonwealth of Massachusetts, is narrowly drawn to protect the best interests of minor, unmarried girls and thus, is constitutional on its face.

## SECOND DEFENSE

The defendant-intervenor responds to the allegations made in the plaintiffs' first amended complaint as follows:

1. The defendant-intervenor neither admits or denies the allegations contained in paragraph 1.

2. The defendant-intervenor denies the allegations contained in paragraph 2.

3. The defendant-intervenor denies the allegations contained in paragraph 3.

4. The defendant-intervenor neither admits or denies the allegations in paragraph 4.

5. The defendant-intervenor denies the allegations in paragraph 5.

6. The defendant-intervenor neither admits or denies the allegations in paragraph 6.

7. The defendant-intervenor has no knowledge as to the truth or

falsity of the allegations contained in paragraph 7.

8. The defendant-intervenor has no knowledge as to the truth or falsity of the allegations contained in paragraph 8.

9. The defendant-intervenor has no knowledge as to the truth or falsity of the allegations contained in paragraph 9.

10. The defendant-intervenor has no knowledge as to the truth or falsity of the allegations contained in paragraph 10 and further denies that Baird "was and is an officer and director of the corporation."

11. The defendant-intervenor admits the allegations in paragraph 11.

12. The defendant-intervenor admits the allegations in paragraph 12 and further states that the action was certified by the court as a class action with respect to the defendant-intervenor.

13. The defendant-intervenor admits the allegations in paragraph 13.

14. The defendant-intervenor neither admits or denies the allegations of paragraph 14.

15. The defendant-intervenor neither admits or denies the allegations of paragraph 15.

16. The defendant-intervenor denies the allegations of paragraph 16 and further alleges that Mary Moe may have suffered irreparable harm as a result of her failure to obtain proper follow-up care.

17. The defendant-intervenor admits that as of January, 1975, Dr. Zupnick was licensed to practice medicine in the Commonwealth of Massachusetts and denies that Dr. Zupnick was or is the medical director of the center. By his own testimony he was a contract physician employed by the center.

18. The defendant-intervenor admits that Baird was a party in the case of Eisinstadt v. Baird, and moves to strike all other allegations in this paragraph as immaterial, self-serving or both.

19. The defendant-intervenor neither admits or denies the allegations of paragraph 19.

20. The defendant-intervenor denies the allegations of paragraph 20.

21. The defendant-intervenor denies the allegations of paragraph 21.

22. The defendant-intervenor denies the allegations of paragraph 22.

23. The defendant-intervenor denies the allegations of paragraph 23.

24. The defendant-intervenor denies the allegations of paragraph 24.

25. The defendant-intervenor denies the allegations of paragraph 25.

26. The defendant-intervenor denies the allegations of paragraph 26.

27. The defendant-intervenor  
denies the allegations of paragraph 27.

28. The defendant-intervenor  
denies the allegations of paragraph 28.

WHEREFORE, defendant-intervenor respectfully requests that the Court dismiss plaintiffs' first amended complaint or, in the alternative, enter judgment in her favor and allow them their costs.

By her attorneys,

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Brian A. Riley

and

---

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[Title omitted in printing]

MOTION OF PLAINTIFFS FOR  
SUMMARY JUDGMENT

Plaintiffs respectfully move this Court for summary judgment declaring the parental consent requirement of Massachusetts G.L. c. 112, §12P, as construed, unconstitutional under the due process and equal protection clauses of the Fourteenth Amendment. In support of this motion, Plaintiffs state:

1. This Court compiled an extensive and thorough record in the proceedings which resulted in the first edition on the merits, Baird v. Bellotti, 393 F. Supp. 847 (D. Mass. 1975).

2. This Court found many factual matters to be established in that opinion, and these appear, upon

further review and study, to be sufficient to warrant a summary judgment in the case as it presently stands.

3. While further evidence may be informative, Plaintiffs believe that sufficient facts are in the record to justify the present motion now. These facts, taken from the opinion, are as follows:

4. "Plaintiff Mary Moe is an unmarried minor residing at home with her parents in Massachusetts. At the time of the institution of the action she was 16 years of age and about 8 weeks pregnant. She has not informed her parents of her condition and does not wish to." 393 F. Supp. at 850.
5. "Her reasons for not informing her parents were in part apprehension of what

might happen to her as a result of their learning she had had intercourse, in part the fear of what would happen to her boy friend, and in part the desire to spare her parents' feelings." 393 F. Supp. at 850.

6. "We find that she is fairly representative of a substantial class of unmarried minors in Massachusetts who have adequate capacity to give a valid and informed consent, and who do not wish to involve their parents." 393 F. Supp. at 850.
7. "In connection with Mary Moe's capacity to represent a plaintiff class, F.R.Civ.P. 23(a)(4), we find, following examination and cross-examination in camera,

- that she is of average intelligence and awareness; that her emotional age at least corresponds with her chronological age, and that she had made a considered decision, before she learned of her pregnancy, that in case of pregnancy she would seek to abort, and that she was competent to make and effectuate that decision." 393 F. Supp. at 850.
8. "Plaintiff William Baird is the founder and director of plaintiff Parents Aid. He describes himself as being, among other things, a pioneer and advocate for the free availability of abortions. He has a strong personal interest in that sense, but no financial or other tangible concern." 393 F. Supp. at 851.
9. "Plaintiff Parents Aid is organized as a Massachusetts non-profit corporation. It provides, through its medical director and supporting personnel, abortions for varying fees, depending upon ability to pay." 393 F. Supp. at 851.
10. "[G]eneral enforcement of the statute against physicians alone would seriously interfere with its [Parents Aid Society's] ongoing activities." 393 F. Supp. at 851.
11. "Plaintiff Gerald Zupnick, a resident of New York, is a physician licensed in Massachusetts, and is Parents Aid's medical director. he works regularly at the latter's place of business two days a week, performing

- abortions on a fee basis.  
... [We] credit his testimony that the threat of prosecution would force him to cease." 393 F. Supp. at 851-852.
12. "We find nothing about abortions that requires the minor's interest to be treated differently from other medical and surgical procedures, as to which we find the custom to be to proceed on the consent of one parent." 393 F. Supp. at 852.
13. "Under all the circumstances we find that plaintiffs had every reason to believe that they had only two alternatives, to continue their current activities and face immediate arrest, or to bring the present suit." 393 F. Supp. at 852.
14. "Defendants' doctor's considerably higher figure we attribute to the fact that he does not do abortions as such, but only 'terminates pregnancy' when there is already some medical necessity. Even he did not suggest any greater risks for minors than for adults." 393 F. Supp. at 853.
15. "Probably most parents are supportive. We are obliged to find, however, that an appreciable number are not, for a variety of reasons." 393 F. Supp. at 853.
16. "We must find, however, that a significant number of minors who are capable of consenting are unwilling to tell their parents, either because they correctly fear what would happen to

- themselves, or, although they would expect support from their parents would under no circumstances consent to the abortion they wish, or, because of their views on illegitimacy and the stigma attaching to unmarried mothers, would attempt to make them enter into a marriage they do not want." 393 F. Supp. at 853.
17. "There are also minors who, understandably, do not wish to have their parents know of their condition because of the distress that it would cause them, and the minor's own consequent feelings." 393 F. Supp. at 853.
18. "Of unquestionable numerical importance, we cannot overlook the fact that many parents believe with total sincerity that abortion is morally impermissible, either under all circumstances or unless to save the life of the pregnant woman." 393 F. Supp. at 854.
19. "Plaintiffs' experts were of the view that a majority of 16 and 17 year olds are capable. Defendants' experts, although they felt that essentially all are capable at 18, considered the 18th birthday a significant turning point, and would concede only a substantial minority at age 17. Whatever may be the value of conclusive presumptions making the 18th birthday a turning point for such matters as voting, the purchase of liquor, and entering into contracts for

- necessaries, ... we can attach no such factual magic to that birthday." 393 F. Supp. at 854-855.
20. "But whichever experts are correct, it is enough for present purposes that we find that a substantial number of females under the age of 18 are capable of forming a valid consent." 393 F. Supp. at 855.
21. "The statute does not purport to require simply that parents be notified and given an opportunity to communicate with the minor, her chosen physician, or others." 393 F. Supp. at 855.
22. "The statute does not exclude those capable of forming an intelligent consent, but applies to all minors." 393 F. Supp. at 855.
23. "The statute does not purport simply to codify what we find to be accepted medical practice in Massachusetts hitherto, namely, that certain medical procedures involving minors require the consent of a parent. This statute creates a special, unique exception by requiring the consent of both parents." 393 F. Supp. at 855.

In sum, this Court has already found sufficient crucial facts in the prior proceedings to form a substantial basis for this motion. Those central facts, set out in detailed quotations above, may be summarized as follows:

(1) Plaintiff Mary Moe represents a substantial class of unemancipated mature minors who do not want to

consult with their parents concerning pregnancy termination.

(2) There is "nothing about abortions that requires the minor's interest to be treated differently from other medical and surgical procedures ...." 393 F. Supp. at 852.

The statute as construed, and as viewed in contrast with the Massachusetts common law and other statutes, singles out abortion-seeking minors in Mary Moe's class for different treatment. They must obtain parental consent or go through a judicial proceeding required of no one else for no other medical care. The record deals extensively with the medical and psychological aspects of abortion and reveals no rational basis whatsoever for such a distinction.

Plaintiffs accordingly move for summary judgment pursuant to Fed. R. Civ. P. 56 upon the extensive facts

previously found in Baird v. Bellotti, 393 F. Supp. at 847 (D. Mass. 1975), the memorandum of law filed herewith, and the entire file and record.

RESPECTFULLY SUBMITTED:

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ATTORNEYS FOR PLAINTIFFS

April 4, 1977

(Title omitted in printing)

COMPLAINT OF PLAINTIFFS- INTERVENORS

Jurisdiction

1. Plaintiffs-intervenors Planned Parenthood League of Massachusetts, Phillip G. Stubblefield and Crittenton Hastings House & Clinic seek injunctive and declaratory relief prohibiting the enforcement of the parental and judicial consent requirements of Mass. G.L. c. 112, §12P. The parental and judicial consent requirements unconstitutionally restrict the performance of abortions in violation of the standards set forth in Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973); and Planned Parenthood of Missouri v. Danforth, U.S. , 96 S. Ct. 2831 (1976). This Court has jurisdiction under the provisions of

28 U.S.C. §§1343(3) and 1331. Relief is authorized by 42 U.S.C. §1983 and 28 U.S.C. §2201.

2. A three-judge district court must hear the prayers for injunctive relief as required by 28 U.S.C. §2281 and 2284, which were in force when this action was brought.

Parties

3. Planned Parenthood League of Massachusetts ("Planned Parenthood") is a not-for-profit unincorporated association with its principal office in Cambridge, Massachusetts. Planned Parenthood has been determined to be exempt from Federal income tax as an organization organized exclusively for charitable purposes within the meaning of §501(c)(3) of the Internal Revenue Code of 1954, as amended.

4. Phillip G. Stubblefield, M.D., is a resident of Brookline, Massachusetts, and a physician licensed to practice medicine in the Commonwealth of Massachusetts.

5. Crittenton Hastings House & Clinic is a Massachusetts corporation, organized and existing as a non-profit corporation pursuant to Mass. G.L. c. 180, and has a principal place of business in Brighton (Boston), Massachusetts. Plaintiff is also a corporation which has been determined to be exempt from Federal income tax as a corporation organized exclusively for charitable purposes within the meaning of §501(c)(3) of the Internal Revenue Code of 1954, as amended.

6. Defendant Bellotti is the Attorney General of the Commonwealth of Massachusetts. Defendant Byrne is District Attorney of the County of Suffolk. Defendant-intervenor Hunerwadel is a resident and citizen of said Commonwealth.

Statutory Provisions Challenged

7. Mass. G.L. c. 112, §12P:  
"Consent to abortion; hearing; form; filing; civil remedies preserved

(1) If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. . . ."

8. As construed by the Massachusetts Supreme Judicial Court in Baird v. Attorney General, Mass. Adv. Sh. (1977) 96, c. 112, §12P:

a) requires prior notice to both parents in every instance where a pregnant minor seeks court approval for an abortion;

b) prohibits a mature minor from consenting to an abortion notwithstanding the fact that in Baird v. Attorney General supra, the court enunciated a "mature minor rule" which

permits a mature minor, without judicial involvement, to consent generally to medical treatment; and

c) Excludes only abortions (and sterilization) from the provisions for consent by a minor to medical treatment set forth in Mass. G.L. c. 112, §12F.

#### Facts

9. Planned Parenthood is a social service agency organized to encourage and facilitate responsible fertility-related behavior and to assure the availability within the state of the full panoply of birth control alternatives, regardless of the age or economic status of the individual seeking such services. In furtherance of its purposes, Planned Parenthood provides a counseling information and referral service. During 1976, Planned Parenthood counseled between twelve and thirteen thousand persons, of whom some thirty

percent called specifically for abortion counselling. Of these, eighteen percent were minors. If enforced, the parental and judicial consent provisions of Mass. G.L. c. 112, §P would seriously interfere with the ability of Planned Parenthood to fulfill its stated purposes in at least the following ways:

a) it would impair the furtherance of responsible fertility-related behavior, in that it would encourage minors who are unwilling or unable to inform their parents of their pregnancy to ignore their condition until the choice to have an abortion was foreclosed;

b) it would impair the agency's counseling service in that it will become impossible to refer to Massachusetts clinics those minor clients who are unable or unwilling to inform their parents of their pregnancy;

c) it would further impair the agency's counseling of minor clients who are poor, who cannot afford to go out of state for medical care, or who would be unable to receive Medicaid payments for medical care received outside Massachusetts.

10. Dr. Stubblefield is an Assistant Professor of Obstetrics and Gynecological Medicine at the Harvard Medical School and Director of the Clinical Population Unit at the Boston Hospital for Woman. As part of his regular professional duties, he currently performs abortions on consenting minor women. The statutes at issue apply directly to his activities as physician and clinic director and would, if enforced, cause him to discontinue performing abortions on minor women without the consent of both their parents or order of the Massachusetts Superior Court.

11. Crittenton Hastings House & Clinic has assisted women with unplanned and/or unwanted pregnancies for over 140 years. Since 1973, it has operated a medical facility and clinic, and provided clinical health and medical services, including birth control, abortion and abortion-related services. Said plaintiff also operates a residential program and an out-patient pre-natal care program for women who wish to carry their pregnancies to term. Said plaintiff is fully licensed under Massachusetts law to provide the foregoing services. During 1976, said plaintiff provided abortion services to 2776 women, approximately 15-20% of whom were minors. Numerous hospitals and social agencies refer patients, including many low-income minors, to said plaintiff's clinic. Said plaintiff does not require parental or judicial consent for abortion.

Enforcement of §12P would expose said plaintiff to criminal liability or force it to curtail on-going activities.

12. Plaintiffs-intervenors each have a professional relationship with pregnant minors who seek their services for abortions and for abortion counseling, and consequently have standing to raise constitutional issues on their behalf, as well as on behalf of plaintiff-intervenors' own, direct interests.

13. On March 24, 1977, the Attorney General of the Commonwealth filed with this Court a "Motion to Dissolve the Preliminary Injunction" -- i.e., this Court's stay of enforcement of c. 112, §12P, and for sanctions under Fed. R. Civ. P. 37.

14. If the enforcement of §12P is not stayed, plaintiffs-intervenors will be irreparably harmed.

#### Violation of Constitutional Rights

15. The parental and judicial consent provisions of c. 112, §12P violate rights guaranteed to plaintiffs-intervenors by the Fourteenth Amendment of the Constitution of the United States and under Roe v. Wade, Doe v. Bolton, and Planned Parenthood v. Danforth, supra, in that they impermissibly impair the rights of plaintiff-intervenors to provide abortions and abortion related services.

16. The parental and judicial consent provisions of c. 112, §12P violate rights guaranteed to unmarried pregnant minors by the Due Process clause of the Fourteenth Amendment to the Constitution of the United States and by Roe v. Wade, Doe v. Bolton, and Planned Parenthood v. Danforth, supra, in that these provisions impermissibly burden the rights of such minors to obtain abortions and abortion related services.

17. The parental and judicial consent provisions of c. 112, §12P, in light of c. 112, §12F, violate rights guaranteed to plaintiffs-intervenors and to unmarried pregnant minors by the Equal Protection clause of the Fourteenth Amendment to the Constitution of the United States in that these statutes prefer and discriminate in favor of:

a) unmarried pregnant minors who choose to carry a pregnancy to term as against such minors who choose to terminate their pregnancies with an abortion;

b) married, widowed or divorced pregnant minors as against unmarried pregnant minors;

c) mature minors who wish to be provided any form of medical treatment or operation, however serious, other than abortion, as against such minors who wish to be provided an abortion.

Relief

WHEREFORE, plaintiffs-intervenors pray that this Court:

- 1) Continue in effect the existing stay of enforcement of Mass. G.L. c. 112, §12P;
- 2) Issue a permanent injunction enjoining the enforcement of Mass. G.L. c. 112, §12P;
- 3) Declare that Mass. G.L. c. 112, §12P is a violation of the Due Process and the Equal Protection clause of the Fourteenth Amendment to the Constitution of the United States;
- 4) Award reasonable attorney's fees and costs;
- 5) Grant such other relief as is just and proper.

By their attorneys,

[Title omitted in printing]

DEFENDANTS' INITIAL STATEMENT  
OF DISPUTED MATERIAL FACTS

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INTRODUCTION

Defendants submit this initial statement of disputed material facts to comply with the Court's order of April 5, 1977 requesting a preliminary response to plaintiffs' motion for summary judgment. This statement is an initial one because defendants have found it difficult to respond to both plaintiffs' motion and the motion to intervene of Planned Parenthood, et al., within a week's time.<sup>1</sup>

DATED: April 1, 1977

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<sup>1</sup> Plaintiffs filed their motion for summary judgment on April 5th, 1977 and without previously informing defendants of their intentions. Defendants had been proceeding on the assumption that plaintiffs would seek a trial.

Moreover, the procedural posture of this case is unusual and complex. Although the Court held a full evidentiary hearing two years ago, the evidence adduced and rulings made were premised upon a now-displaced interpretation of the challenged statute. Moreover the Supreme Court and the Supreme Judicial Court have refined some of the other legal issues involved in the case, but these references have had no effect upon the record. Finally, defendants remain uncertain of the Court's view of the materiality of some of its previous findings, several of which plaintiffs rely upon in their motion for summary judgment.

Given the constraints of time and the uncertain formulation of the factual and legal issues, defendants thought it best to file this initial statement. Set forth below is an

enumeration of the material facts defendants consider in dispute, organized by legal issue and annotated with reference to the case law in those instances in which materiality seems equivocal. At this point, defendants take the position that, since genuine issues of material fact exist, summary judgment is not available. Defendants remain prepared to reconsider their position, however, on the basis of the Court's disposition of this initial statement.

## LIST OF MATERIAL FACTS IN DISPUTE<sup>2</sup>

### I. The Undue Burden Issue

A. How many girls under the age of 18 seek abortions in Massachusetts each year? How many of these girls are nine-twelve years old? How many of these girls are thirteen-fifteen years old? How many of these girls are sixteen-eighteen years old? (See Exhibit A.)

B. Of the girls who seek abortions, how many do so with

1. one parent's consent;
2. both parents' consent;

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<sup>2</sup>

The list is drawn in question form since defendants at this point in discovery have more questions than answers. Defendants assume that the parties will disagree over most of the answers to these questions.

3. no parental consent?<sup>3</sup>

C. For each category of B, what is the distribution of

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"We have never held or implied on common law grounds that a physician may operate on a minor, where there is no emergency, without the consent of at least one parent. We have indicated that such an unauthorized operation constitutes an intentional tort. See Reddington v. Clayman, 334 Mass. 244, 246-247 (1956). The Legislature's treatment of the subject of consent to medical treatment of a minor has been consistent with the general common law principle that parental consent is necessary for medical services to be performed in the absence of an emergency . . . [footnote omitted]." Baird v. Attorney General, 1977 Mass. Adv. 96, 110, 360 N.E.2d 288, 297 (1977) [hereinafter Attorney General].

duration of pregnancies, i.e., for those girls who seek an abortion with the consent of one parent, how many do so within the first four weeks of the first trimester, the first six, etc?<sup>4</sup>

- D. For those girls in category B3, how many do not seek parental consent
1. because they correctly fear parental sanctions;
  2. because they believe their parents would not consent;
  3. because they believe their parents would attempt to make them
- 

enter into a marriage they do not want;

4. because they desire not to upset their parents?
- E. For each category in D other than the first, how many parents respond or would respond in the manner their daughters anticipate? How many would respond otherwise, and how would they respond?
- F. Of those girls who seek abortions after consulting one or both parents, how much delay, if any, is attributable to their securing parental consent? Of those girls who seek abortions without parental consent, how long would it take for them to consult with their parents?

<sup>4</sup>

See plaintiffs' Memorandum in Support of Their Motion for Summary Judgment [hereinafter plaintiffs' memorandum] at 15, lines 25-27.

G. In those cases in which a girl sought an abortion without parental consent, was required to consult her parents, and was refused parental authorization, how quickly could she present her case to the Superior Court and obtain a decision?<sup>5</sup>

H. How quickly could a girl in the circumstances described in G obtain appellate review of an adverse Superior Court ruling?<sup>6</sup>

I. Would a girl who sought Superior Court authorization for an abortion after her parents refused to consent suffer substantial injury to her health and welfare as a

result? How does this injury, if any, compare to the injury, if any, children suffer through their participation in custody, guardianship, commitment, juvenile delinquency, or intra-familial tort proceedings?<sup>7</sup>

J. Of the girls identified in A and B, how many would

1. seek out-of-state abortions or
2. seek in-state abortions from unlicensed persons or facilities

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Bellotti v. Baird, 428 U.S. 132, 149-50 (1976); Planned Parenthood of Missouri v. Danforth, 428 U.S. 52, 75, 91 (Stewart, J., concurring); 95 (White, J., concurring and dissenting); 103-04 (Stevens, J., concurring and dissenting) (1976) [hereinafter Danforth].

<sup>5</sup> Compare plaintiffs' memorandum at 16, lines 1-5 with Attorney General at 113-15, 360 N.E.2d at 297-98.

<sup>6</sup> Compare plaintiffs' memorandum at 16, lines 1-5 with Attorney General at 115-16, 360 N.E.2d at 298.

if the statute were in effect and applied as interpreted by the Supreme Judicial Court?<sup>8</sup>

K. What other medical, surgical, or psychiatric procedures or treatments, other than abortion, sterilization, and methadone maintenance<sup>9</sup> are governed by statute, regulation, or professional practice so as to require the consent of both parents

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<sup>8</sup> Danforth at 104 (Stevens, J., concurring and dissenting and stating that "[t]he State's interest is not dependent on an estimate of the impact the parental-consent requirement may have on the total number of abortions that may take place . . .").

<sup>9</sup> Mass. Gen. Laws Ann. ch. 112, §§ 12E (exclusion of methadone maintenance), 12F (exclusion of abortion and sterilization) (West Supp. 1976).

before being performed on or administered to minors?<sup>10</sup>

L. What is the practice of licensed Massachusetts health care personnel and institutions concerning "mature minors" who seek health care other than abortion or sterilization and including methadone maintenance without parental consent? What is the practice of these persons and institutions concerning "non-mature minors" who seek the same care in the same circumstances?<sup>11</sup>

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<sup>10</sup> See note 7, supra.

<sup>11</sup>

Bellotti v. Baird, supra at 144-45; Attorney General at 108-12, 360 N.E.2d at 293-97.

M. Does the statute "needlessly and incorrectly" increase the likelihood of minors having to seek judicial authorization for abortion surgery?

If so, how?<sup>12</sup>

N. What risks, if any, would a female Massachusetts citizen under 18 expose herself to by seeking a legal abortion in another jurisdiction? What is the probability of such a girl's experiencing such untoward occurrences?<sup>13</sup>

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<sup>12</sup> Baird v. Bellotti, Civil Action No. 74-4992-F (D. Mass., Feb. 10, 1977) at 3.

<sup>13</sup> Plaintiffs' memorandum at 16, lines 32-4.

## II. The "Degree and Justification" Issue

A. What is the practice of licensed Massachusetts health care personnel and institutions concerning the performance or administration of the following range of procedures or treatments upon a) "mature minors" and b) "non-mature minors" with the consent of one parent, the consent of both parents, and no parental consent:

1. sterilization;
2. prescription of birth control drugs or devices;
3. methadone maintenance;
4. venereal disease;
5. amputations (therapeutic and corrective);
6. shock therapy;
7. kidney and bone marrow transplants;

8. psychiatric commitments;
  9. venipuncture;
  10. blood donations,
  11. experimental therapy;
  12. medical research?<sup>14</sup>
- B. How many of each of the procedures or treatments listed in A are performed annually in Massachusetts upon a) "mature minors" and b) "non-mature minors" with
1. the consent of one parent;
  2. the consent of both parents;
  3. no parental consent?
- C. What are the medical, social, and related justifications for the differences, if any, in the practices of
- 

Massachusetts health care professionals and institutions<sup>15</sup> concerning the procedures and treatments enumerated in A?

- D. What are the circumstances in which it is the practice of licensed Massachusetts health care professionals and institutions to seek court approval prior to administering medical care to minors?<sup>16</sup>

#### CONCLUSION

Defendants submit that this initial list of disputed facts is sufficiently substantial to require denial of plaintiffs' motion for summary judgment. Unless the Court determines that they are not material, defendants believe that further discovery and trial are necessary to

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<sup>14</sup> Bellotti v. Baird, supra at 149-50; Baird v. Bellotti, supra at 4-5; see Attorney General at 116-18, 123-26, 360 N.E.2d at 298-99, 302-03.

<sup>15</sup> See note 13, supra.

<sup>16</sup> See notes 12 and 13, supra.

resolve the disputes and establish an adequate record.

By their attorneys,

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Garrick F. Cole  
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727-1004

Thomas Kiley  
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Dated: April 12, 1977

EXHIBIT A  
UNITED STATES DISTRICT COURT  
FOR THE  
WESTERN DISTRICT OF MICHIGAN  
Southern Division

CASE NO. G75-142 CA 2  
JOHN DOE, JANE DOE, THOMAS M. GROST, )  
and CORA W. GROST, individually and on )  
behalf of all other similarly )  
situated,

Plaintiffs,  
vs.

MARIANNE DAVIS, Administrator, and )  
JOHN HAZEN, M.D., Medical Director )  
Ingham County Family Planning Center, )  
a/k/a Tri-County Family Planning )  
Center; ELINOR HOLBROOK, GILDA )  
RICHARDSON, MARIE VANDE BUNTE and )  
RONALD PETERS, Members of the Ingham )  
County Board of Health; GEORGE )  
DELLAPORTAS, M.D., Director, Ingham )  
County Health Department, and their )  
successors in office, )  
Defendants. )

The deposition of JAMES H. FORD, M.D., a witness produced and sworn on behalf of the Plaintiffs in the above-entitled cause, taken before GAIL S. KUNIHIRO, CSR, Notary Public, at 11777 San Vicente Boulevard, in the City of Los Angeles, California, on the 30th day of January, 1976, at 1:40 o'clock p.m., pursuant to Subpoena and Subpoena duces tecum.

Reported by Gail S. Kunihiro, CSR #2797

\* \* \* \* \*

fact that the doctor is prescribing it, and that there are rap sessions where you counsel it, whether or not they use the contraceptive, they are going to go out and have their premarital intercourse anyway.

Any so you are then going to have [more promiscuity] of course -- [But] Pohlman said, even if that is so, even

if we have increased the promiscuity, that he would feel it was justified as long as we reduce the out of wedlock pregnancies by dispensing more contraceptives devices.

But that has been shown to be wrong, too, because we know that we now have [more out of wedlock pregnancies] -- Although the out of wedlock pregnancies for adult women have leveled off, if not gone down a little bit, the teenagers have gone up and from '60 to '73, the teenage out of wedlock pregnancy has risen 80 percent; and , as I say, that figure came out [recently] an that's [only] up to '73.

We don't have [the current] figures, but we now have the complaint from many contraceptive clinics saying what are we going to do now with the nine-year-olds coming in, because they don't even understand the brochure; and [now] feel they must tell the

parents about this, so it is a little bit interesting where they are deciding to draw the line.

Apparently, they think 15-year-olds understand enough but a nine-year-old doesn't and admittedly there is some difference, but I think the evidence is clear that we have an epidemic of V.D. We have an epidemic of promiscuity.

Exhibit B

Preteen Clients Worry  
Birth Control Counselors

SAN FRANCISCO (AP) -Girls as young as 9 years old are asking for birth control advice and pose a special problem as to whether their parents should be notified, a Planned Parenthood leader here says.

"A whole new policy or special program must be created for girls 9 to 12 years old who are sexually active and need advice." Dr. Gerry Oliva, medical director for the agency said in an interview.

Oliva said part of the problem is that the agency's information pamphlets, aimed at reaching adults, are "too complicated for a sixth-grader to understand."

She said the agency has a policy of not telling parents when their children come in for advice or contraceptives. This practice has so far been extended to even the youngest clients.

"It is hard not to call parents when the girls are 9 or 10," Oliva said.

She said the trend toward earlier sexual activity means that parents must advise their children earlier than in the old days.

"Now telling a girl the facts of life when she's 9 years old may be too late to stop her from having sex," Oliva said.

She said she learned at a national Planned Parenthood Federation convention in Seattle earlier this week that other areas of the country are experiencing the same increase in preteen activity.

"Agency counselors throughout the country are totally overwhelmed by these kids," she said.

Oliva said girls as young as 9 never are given birth control pills, because medical specialists have advised the agency not to provide them unless a girl has had regular menstrual periods for at least a year.

The California Health Department shows 32 births to 12-year-old-mothers during 1974, up from 18 girls of that age who gave birth in 1966.

## 9-Year-Old Girls Already Ask About Birth Control

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has so far been extended to even the youngest clients.

"It is hard not to call the parents when the girls are 9 or 10," Dr. Oliva said.

Dr. Oliva said girls as young as 9 never are given birth control pills, because medical specialists have advised the agency not to provide them unless a girl has had regular menstrual periods for at least a year.

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She said the trend toward earlier sexual activity "means that parents must advise their children earlier than in the old days.

"Now, telling a girl the facts of life when she's 9 years old may be too late to stop her from having sex," Dr. Oliva said.

In Rockville, Md., a spokeswoman for the National Center for Health Statistics, a bureau of the Health, Education and Welfare Department, said of the 3, 136,965 births in the United States in 1973, there were 12,861 births to girls under 15 years old. Of that total, 11,412 were first births, 276 second births, 15 third births and 8 were fourth births.

[Title omitted in printing]

Excerpt From Transcript of  
Hearing on April 13, 1977  
Constituting Court's Disposition  
of Plaintiffs' Motion for  
Summary Judgment

JUDGE ALDRICH: I think I had the bailiff call this a two-judge court. Only two of us are here. Judge Freedman is here in spirit, as I told you last week, and is in Springfield. We will consult with him before we take any action as the result of this morning's hearing.

Let me say before we get down to anything else that the Court greatly appreciates the confidential [considerable?] memorandum submitted by Mr. Cole as to the faculty [fact?] issues the defendants consider of relevancy or possible relevancy. In answer to

his implied question whether the Court considers them not material, I can only generalize and, like the defendants, not finally and bindingly so. First I might wonder whether answers could be found to every one of them, but I assume otherwise for the moment.

Secondly, I presently think some are not material, but, thirdly, I think some probably and perhaps clearly could be. Equally, I could not think that these are all answers [ed?] by our prior opinion or opinions. Hence, I -- I'm speaking for all three of us -- do not wish to proceed with the motion for summary judgment on the present record, and an evidentiary trial in the absence of stipulations would seem inevitable.

Before leaving the subject, I would comment on one question in the defendants' memorandum.

G and H, particularly in light of the Supreme Judicial Court opinion, appear to the Court to raise questions of constitutionality as applied and not to present germane questions to this Court.

In other words, we rule now that we will conclusively assume for the purposes of our decision, utmost speed, diligence, and proper procedure and consideration, including protection of privacy by the Superior Court and an Appellate Court. This is a non issue. How shall we proceed?

\* \* \* \* \*  
Annotations in brackets are supplied by counsel.

[Title omitted in printing]

DEFENDANTS' FIRST SET OF REQUESTS  
FOR ADMISSIONS TO PLAINTIFF  
GERALD ZUPNICK

To: Gerald Zupnick, M.D.  
c/o Parents Aid Society, Inc.  
673 Boylston Street  
Boston, Massachusetts

Pursuant to Fed.R.Civ.P. 36,  
defendants Francis X. Bellotti, et  
al., request that you respond to the  
following requests for admissions.

Your answers must be written and made  
under oath. You must serve your  
answers upon all parties and file them  
with the Court within thirty days  
after their service upon you, or  
within such other time as the Court  
determines.

Defendants request that you admit  
the truth of the following statements,  
and, as appropriate, the truth of any

subsidiary assertions about the  
statements:

I. GENERAL BACKGROUND STATEMENTS

A. Distribution of Abortions and  
Pregnancies by Age of Adolescent

- ✓ 1. The following table sets forth  
reasonably accurate approximations of  
the numbers of female adolescents  
residing in Massachusetts, by age, as  
of June, 1976:

<u>Age</u>	<u>Number of Female Adolescents</u>
10	53,500
11	56,000
12	57,000
13	55,500
14	58,000
15	58,000
16	58,000
17	58,000

Source: Commonwealth of Massachusetts, Department of Education, Enrollment Statistics for School Year 1975-1976; Statistical Abstracts of the United States, 1976, p.11,27; U.S. Bureau of the Census, Census of Population: 1970 DETAILED CHARACTERISTICS, Final Report PC(1)-D(23) Massachusetts, Table 138.

2. During the calendar year 1976, hospitals and clinics in Massachusetts performed approximately 33,000 abortions. Of this number, approximately 30,000 or 91% were performed during the first trimester.

Source: Commonwealth of Massachusetts, Department of

Public Health, Abortion Reporting System, Statistics of Induced Abortions.

3. The following statistics are reasonably accurate approximations of the incidences of pregnancies and abortions among female adolescents in the United States:
  - a. Approximately 1,000,000 persons or 10% of the female adolescent population age 15-19 in the United States become pregnant each year;
  - b. Approximately 590,000 persons or 5.9% of the female adolescent population age 15-19 in the United States give birth each year;
  - c. Approximately 270,000 persons or 2.7% of the female adolescent population age 15-19 in the United States undergo an induced abortion each year;

d. Approximately 140,000 persons or 1.4% of the female adolescent population age 15-19 in the United States experience miscarriages each year;

e. Approximately 30,000 persons or 0.7% of the female adolescent population in the United States under age 15 (the great majority of which is composed of persons 13 or 14) become pregnant each year;

f. Approximately 13,500 persons or 0.315% of the female adolescent population in the United States under age 15 (the great majority of which is composed of persons 13 or 14) undergo an induced abortion each year;

g. Approximately 12,600 persons or 0.294% of the female adolescent population in the United States under age 15 (the great majority of which is composed of persons 13 or 14) give birth each year;

h. Approximately 3,900 persons or 0.091% of the female adolescent population in the United States under age 15 (the great majority of which is composed of persons 13 or 14) experience miscarriages each year.

Source: "11 Million Teenagers", Planned Parenthood Federation of America, Allan Guttmacher Institute (1976); Jaffe & Dryfoos, "Fertility Control and Services for Adolescents: Access and Utilization," 8 Family Planning Perspectives 4: 167, 174 (1976).

4. There is no reason to believe that the distribution of adolescent pregnancies and their outcomes stated in paragraph (3), above, is not similar to the distribution of adolescent pregnancies and their

outcomes among the Commonwealth's female adolescent population.

5. Assuming that the distribution of adolescent pregnancies and their outcomes stated in paragraph (3) is similar to the distribution of adolescent pregnancies and their outcome among the Commonwealth's female adolescent population, the following table sets forth reasonably accurate approximations of the number of pregnancies and their outcomes which female adolescents in Massachusetts experience each year by age category:

<u>Age</u>	<u>Pregnancies</u>	<u>Abortions</u>
<u>Births</u>	<u>Miscarriages</u>	
13	N/A	N/A
N/A	N/A	
13-14	660	300
275	85	
15-19	22,000	5,940
12,980	3,080	

Source: Paragraphs 1, 2, and 3 above.

6. Plaintiff Gerald Zupnick has no knowledge concerning the distribution of abortions performed on female adolescents in Massachusetts with respect to whether these abortions were performed with no parental consent, with one parent's consent, or with two parents' consent.
7. Plaintiff Gerald Zupnick has no knowledge concerning the distribution of abortions performed on female adolescents in Massachusetts with respect to whether those abortions were performed on married or unmarried female adolescents.
8. (a) During calendar year 1975, hospitals and clinics in New York State performed 153,484 abortions. Of this number,

1,670 or 1.08% were performed on female adolescents under 15 years of age, and 38,345 or 24.98% were performed on female adolescents between 15 and 19 years of age.

- (b) 704 female Massachusetts residents obtained abortions in New York State in 1975. This number amounted to 0.46% of the total abortions performed in New York State in 1975.
- (c) In New York State, during the years 1971-1975, the distribution of abortions by age of females obtaining abortions remained fairly constant, i.e., approximately 1% were performed on female adolescents under 15 each year and approximately 25%

were performed on female adolescents 15-19 years of age.

Source: New York State Department of Health, Report of Selected Characteristics of Induced Terminations of Pregnancy Recorded in New York State January-December 1975 With Five Year Summary 1971-1975 (undated).

B. Facts Concerning "Legally Effective Consent" to Abortion Procedures

9. The percentage of female adolescents who are unable to give

legally effective consent<sup>5</sup>

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For the purpose of answering the series of requests in this sub-section, please assume that the term "legally effective consent" has the meaning which the District of Columbia Court of Appeals suggested in Canterbury v. Spence, 464 F.2d 772, 782, 786-87 (D.C. Cir. 1972): a person capable of granting "legally effective consent" to medical care is one who is competent to evaluate the information which a physician must provide to meet his duty to make "reasonable disclosure of the choices with respect to proposed therapy and the dangers inherently and potentially involved . . . [and] the test for determining whether a particular peril must be divulged is its materiality to the patient's decision: all risks potentially affecting the decision must be unmasked . . . ."

to medical or surgical procedures varies continuously and increases as their age decreases.

10. A majority of females 17 years old is unable to give legally effective consent to medical or surgical procedures.
11. A majority of females 16 years old is unable to give legally effective consent to medical or surgical procedures.
12. A majority of females 15 years old is unable to give legally effective consent to medical or surgical procedures.
13. A majority of females 14 years old is unable to give legally effective consent to medical or surgical procedures.
14. A majority of females 13 years old is unable to give legally effective consent to medical or surgical procedures.

15. A majority of females 12 years old is unable to give legally effective consent to medical or surgical procedures.
16. A majority of females 11 years old is unable to give legally effective consent to medical or surgical procedures.
17. A majority of females 10 years old is unable to give legally effective consent to medical or surgical procedures.
18. A majority of females 9 years old is unable give legally effective consent to medical or surgical procedures.
19. A majority of females 8 years old is unable to give legally effective consent medical or surgical procedures.
20. A majority of females 7 years old is unable to give legally effective consent to medical or surgical procedures.
21. A majority of females 6 years old is unable to give legally effective consent to medical or surgical procedures.
22. A majority of females 5 years old is unable to give legally effective consent to medical or surgical procedures.
23. No female 17 years old is able to give legally effective consent to medical or surgical procedures.
24. No female 16 years old is able to give legally effective consent to medical or surgical procedures.
25. No female 15 years old is able to give legally effective consent to medical or surgical procedures.
26. No female 14 years old is able to give legally effective consent to medical or surgical procedures.
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29. No female 11 years old is able to give legally effective consent to medical or surgical procedures.
30. No female 10 years old is able to give legally effective consent to medical or surgical procedures.
31. No female 9 years old is able to give legally effective consent to medical or surgical procedures.
32. No female 8 years old is able to give legally effective consent to medical or surgical procedures.
33. No female 7 years old is able to give legally effective consent to medical or surgical procedures.
34. No female 6 years old is able to give legally effective consent to medical or surgical procedures.
35. No female 5 years old is able to give legally effective consent to medical or surgical procedures.

C. Post-Operative Complications  
Of Abortion Procedures.

36. With respect to the following quotation defendants request that you admit that:
  - a. the quoted material actually appears in the cited journal as it is reproduced here;
  - b. the journal in which the quoted material appears is a reliable medical or scientific authority; and
  - c. the quoted material's factual statements are correct:

The postoperative complications [of abortions] can be divided roughly [sic] into two groups: those which occur immediately and are associated with the particular procedure utilized for the termination of pregnancy, and the delayed complications which may

occur as much as 2 to 3 weeks or more after the procedure is performed. Each of the procedures utilized has complications which are peculiar to that particular procedure.

#### VACUUM ASPIRATION

Primary complications are damage to the lower uterine segment and uterine fundus by tearing or perforation. In most cases, the initial trauma occurs during cervical dilatation and may involve either splitting of a rigid lower uterine segment or actual perforation of the softened myometrium by a cervical dilator. These surgical accidents may result in extensive retroperitoneal and intraperitoneal hemorrhage and, if the surgeon proceeds with the

vaccum aspiration, trauma to various intraperitoneal structures may occur.

The other complication of this procedure results from the incomplete removal of the products of conception. Such incomplete removal almost always results in profuse vaginal bleeding, which may not become significant until 2 to 5 days after the procedure is performed and may be associated with evidence of endometritis or parametritis. If such incomplete removal of products of conception is also combined with uterine trauma, with perhaps retroperitoneal hematoma, the combined effect may result in serious vaginal hemorrhage and wide-spread pelvic infection, occasionally requiring surgical drainage of a pelvic abscess or hysterectomy. Such complications

would be particularly devastating in an adolescent woman. Minor episodes of increased vaginal bleeding are quite common and usually require little treatment other than a brief course of methyl ergonovine and reassurance.

Simple endometritis, following a properly performed vacuum aspiration, usually follows the use of vaginal tampons or having sexual intercourse too soon after the procedure. It is best managed by antibiotic therapy. Curettage is usually not necessary unless the patient fails to respond promptly to conservative therapy.

The overall immediate complication rate in the hands of competent surgeons involved in the termination of pregnancy up to 12 weeks of gestation need not be greater than 1.5 to 2 per cent

since higher complication rates are almost always associated with inexperience and poor judgment.<sup>5</sup>

#### HYPERTONIC SALINE INSTILLATIONS

The complications associated with this procedure are more frequent and, because of the longer duration of gestation, more serious.<sup>1</sup> If the technique of

Note: Footnote references are

1. Kerenyi, T.: Personal communication.
5. Tietze, C., and Lewit, S.: Early medical complications of legal abortion - The JPSA study. To be published by Case Western Reserve Law Review, Abortion and the Law.

amniocentesis or saline instillation is faulty, the hypertonic saline may be injected directly into the maternal vascular system. Such an occurrence brings about an immediate reaction - peripheral vasodilatation and tachycardia. The patient will almost immediately complain of an intense headache. Of course, the instillation should cease and the patient should receive a rapid intravenous infusion of 5 percent dextrose in water. Intoperitoneal extravasation of hypertonic saline causes severe abdominal pain and may be treated by peritoneal lavage with sterile 5 per cent dextrose in water. Approximately 15 per cent of all cases of pregnancies terminated by this technique will have a retained placenta which is

frequently the cause of extensive vaginal bleeding. It is for this reason, among many others, that this procedure should be performed in a hospital where all patients will require curettage or manual removal of the placenta. The occasional woman who has a previously undiagnosed placenta previa will also experience significant vaginal bleeding prior to the expulsion of the product of conception. The need for blood transfusions with the ensuing risks is significant in these cases. A large series reports a transfusion incidence of 2.3 per cent.<sup>1</sup>

Note: Footnote reference is

1. Kerenyi, T.: Personal communication.

Recently, there have been several reports of a consumption coagulopathy occurring at the time of instillation of hypertonic saline, which results in profuse hemorrhage because of hypofibrinogenemia. While this complication is rare, the hemorrhage may be extensive and quite frightening. Treatment includes fibrinogen, whole blood, and heparin.

Fever as a result of endometritis or parametritis occurs in about 2.3 per cent of all cases and may be associated with retained placental fragments. Treatment with antibiotics and uterine curettage are usually necessary. Occasionally, more widespread pelvic infection may occur, but these cases also respond promptly to simple therapeutic measures.

#### HYSTEROTOMY

The complications of hysterotomy are essentially the same as those associated with caesarian section and need not be reviewed at this time.

Source: Hausknecht, "The Termination of Pregnancy in Adolescent Women", 19 Pediatric Clinics of North America 3: 803, 807-808 (1972).

36A A paper describing the results of the Joint Program for the Study of Abortion which involved a total of 72,988 abortion procedures contained a lengthy discussion of the complications and mortality resulting from abortion procedures. That discussion is quoted below.

With respect to the following quotation, defendants request that you admit that:

- a. the quoted material actually appears in the cited journal as it is reproduced here;
- b. the journal in which the quoted material appears is a reliable medical or scientific authority;
- c. the quoted material's factual statements are correct;
- d. the quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

#### COMPLICATIONS

The number of postabortion complications reported in JPSA [Joint Program for the Study of Abortion] was very large because it included many complaints of a comparatively trivial nature, such as a single day of fever or vomiting after anesthesia, which are not usually listed in official reports. The total number of women with one or more complaints was 7039 or 9.6% of all JPSA patients. Not classified as complications were 893 cases, or 1.2% of all JPSA abortions, reported as failures of the primary procedure of which 569 cases were followed by a successful repetition of the same procedure and 324 cases, by changing to other procedures.

A broad definition of complications has the advantages of including complaints reported by patients, as well as diagnoses made by physicians, and of permitting the analysis of the incidence for comparatively small numbers of women. On the other hand, it may produce a quite distorted impression of the risk to health associated with a legal abortion. We have therefore attempted to identify a more restricted group of "major complications," including all patients experiencing unintended major surgery (laparotomy and repair, hysterotomy, and hysterectomy - 120 cases); all patients requiring one or more blood transfusions (277); all patients with 3 or more days of fever (358); and several other categories associated with roughly

comparable degrees of risk of death, prolonged illness, or permanent functional impairment. The total number of cases assigned to major complications was 765, 1% of all patients and 11% of all patients with complications. Of the 765 patients with major complications, 43 remained in the hospital for 2 weeks or longer postoperatively or after readmission.

Although every definition of major complication is arbitrary to some degree, at least until standards are agreed upon by the medical profession, it was encouraging to find that the patterns of major and total complications were similar in their association with such variables as period of gestation and primary procedure.

## MORTALITY

Seven deaths were recorded among the 72,988 JPSA patients, corresponding to a mortality rate of 9.6 per 100,000 abortions. All but one involved abortions in the second trimester. Three deaths occurred among 1755 patients aborted by major surgery; three deaths among 14,690 abortions by the saline method; and one death among 56,273 patients aborted by suction or D and C.

In four of the seven cases the fatal outcome could be directly attributed to the abortion. The first patient was 45 years of age when she underwent hysterotomy and bilateral tubal ligation. Within 3 hours after the operation, she developed disseminated intravascular coagulation with severe hypofibrinogenemia. The

patient did not respond to treatment and died on the eighth postoperative day.

The second patient was a woman 37 years of age whose pregnancy was terminated by saline at 15 weeks' gestation. Soon after the instillation, she developed hypernatremia with cerebral edema, leading successively to convulsive episodes, prolonged hypoxia, and renal failure, as well as to aspiration pneumonia. She died 10 days after the instillation.

The third fatality was a woman from another state who sought treatment under an assumed name in a participating hospital in New York City. Having undergone instillation of saline as an outpatient, she returned to her home where she died on the following day of severe hemorrhage.

while passing a fetus compatible in size with a gestation of about 24 weeks.

The fourth patient was a primigravida, 18 years old, who committed suicide 3 days after the suction procedure, because of guilt feelings about having "killed her baby," before she could be informed that she had not been pregnant.

In the three other cases, preexisting disease doubtless contributed to the fatal outcome. One patient had a history of rheumatic heart disease, mitral stenosis and insufficiency, bacterial endocarditis, and addiction to heroin. She collapsed on the operating table immediately following hysterotomy; the cause of death was recorded as cardiac arrest. Another patient had a long history of pelvic

inflammatory disease with repeated abdominal operations. Following hysterotomy she developed peritonitis and died 6 days postoperatively. The seventh deceased patient, who had a history of schizophrenia, was aborted by saline late in the second trimester. She was returned to a psychiatric institution and 1 month later left the hospital against medical advice and committed suicide. The association of this death with abortion is highly questionable.

Source: Tietze and Lewit, "A National Medical Experience: The Joint Program for the Study of Abortion (JPSA)," reproduced in The Abortion Experience Psychological & Medical Impact, 1, 12 (H. Osofsky & J. Osofsky ed. 1973).

36B A paper describing the results of the Joint Program for the Study of Abortion, which involved a total of 72,988 abortions, contained a table comparing complication rates of patients who received abortions only to those who received an abortion plus another surgical procedure. That table is reproduced below. With respect to the following quotation, defendants request that you admit that:

- a. the quoted material actually appears in the cited journal as it is reproduced here;
- b. the journal in which the quoted material appears is a reliable medical or scientific authority;
- c. the quoted material's factual statements are correct;
- d. the quoted material's statements of expert judgment and

opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

TABLE 1-6. Number of All Patients and Patients with "Abortion Only," and Complication Rates per 100 Women, by Period of Gestation

Gestation (wk)	Number		Total complication rate		Major complication rate	
	Total patients	Local patients with followup	Total patients	Local patients with followup	Total patients	Local patients with followup
<b>All patients</b>						
6 or less	2,367	857	5.2	8.9	0.9	2.0
7-8	15,137	5,448	4.2	6.3	0.4	0.6
9-10	22,422	8,150	4.8	7.2	0.6	0.9
11-12	13,954	5,434	6.8	10.0	1.0	1.7
13-14	4,044	1,895	15.9	19.3	2.1	2.3
15-16	3,774	1,761	24.0	27.8	2.5	3.1
17-20	9,573	3,816	24.0	28.9	2.2	3.3
21-24	1,616	552	22.8	24.1	2.1	3.1
25 or more	101	36	26.7	30.6	*	*
12 or less	53,880	19,889	5.2	7.8	0.6	1.1
13 or more	19,108	8,060	22.2	26.1	2.2	3.0
All gestations	72,988	27,949	9.6	13.1	1.0	1.6
<b>"Abortion only"</b>						
6 or less	2,246	782	4.1	7.0	0.6	1.3
7-8	14,344	5,008	3.5	5.1	0.3	0.4
9-10	21,194	7,515	4.1	6.1	0.4	0.6
11-12	12,838	4,799	5.2	7.2	0.5	0.7
13-14	3,495	1,576	13.4	16.2	1.2	1.3
15-16	3,293	1,488	22.3	25.9	1.8	1.9
17-20	8,748	3,352	22.7	27.1	1.7	2.6
21-24	1,456	472	20.9	21.2	1.2	(1.3)
25 or more	83	29	25.3	(27.6)	*	*
12 or less	50,622	18,104	4.2	6.2	0.4	0.6
13 or more	17,075	6,917	20.6	24.0	1.6	2.1
All gestations	67,697	25,021	8.4	11.1	0.7	1.0

( ) and \* = inadequate number of women at risk.

Source: Tietze and Lewit, "A National Medical Experience: The Joint Program for the Study of Abortion (JPSA)," reproduced in The Abortion Experience, Psychological & Medical Impact, 1, 16 (H. Osofsky & J. Osofsky ed. 1973).

36C A paper describing the results of the Joint Program for the Study of Abortion which involved a total of 72,988 abortions, contained a

graph plotting the range of complication rates per 100 patients with abortion only, by age of the woman. That graph is reproduced below.

With respect to the following quotation, defendants request that you admit that:

- a. the quoted material actually appears in the cited journal as it is reproduced here;
- b. the journal in which the quoted material appears is a reliable medical or scientific authority;
- c. the quoted material's factual statements are correct;
- d. the quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and

represent generally accepted professional judgments and opinions:

The Joint Program for the Study of Abortion (JPSA)

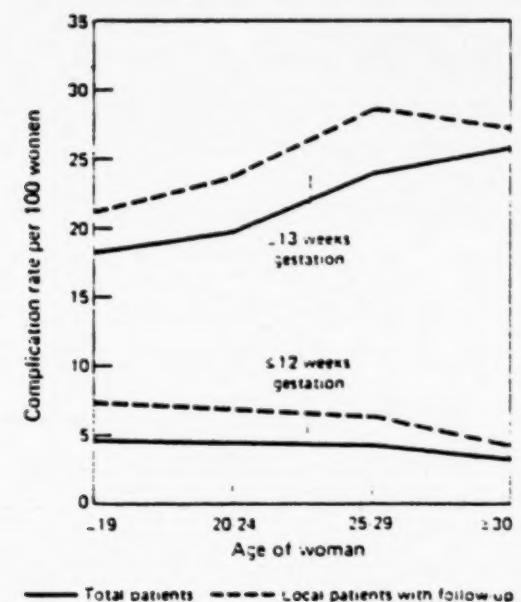


Figure 1-1. Range of complication rates per 100 patients with "abortion only," by age of woman.

Source: Tietze and Lewit, "A National Medical Experience: The Joint Program for the Study of Abortion (JPSA)," reproduced in The Abortion Experience, Psychological & Medical Impact, 1, 19 (H. Osofsky & J. Osofsky ed. 1973)

36D A paper describing the experience of health care institutions in New York City with abortions performed under New York's liberalized abortion law included two tables concerning the complication rates associated with abortion procedures. These two tables are reproduced below.

With respect to the following quotation, defendants request that you admit that:

- a. the quoted material actually appears in the cited journal as it is reproduced here;
- b. the journal in which the quoted material appears is a reliable medical or scientific authority;
- c. the quoted material's factual statements are correct;
- d. the quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

TABLE 3-11. Complications Following Abortion, by Type and Period of Gestation, per 1000 Abortions—New York City

Type of complication	Total		12 Weeks and under		13 Weeks and over	
	Number	Rate	Number	Rate	Number	Rate
<b>July 1, 1970-June 30, 1971*</b>						
Hemorrhage	192	1.5	84	0.8	108	4.7
Infection	248	1.9	102	0.9	146	6.3
Perforated uterus	192	1.5	168	1.5	24	1.0
Anesthesia	12	0.1	7	0.1	5	0.2
Shock	9	0.1	2	†	7	0.3
Retained tissue	289	2.2	56	0.5	233	10.1
Failure	67	0.5	5	†	62	2.7
Lacerated cervix	31	0.2	24	0.2	7	0.3
Other	66	0.5	42	0.4	24	1.0
Unspecified	11	0.1	7	0.1	4	0.2
Total complications	1,117	8.5	497	4.6	620	26.8
Total abortions	131,956		108,817			
<b>July 1, 1971-June 30, 1972</b>						
Hemorrhage	187	0.9	56	0.3	131	4.0
Infection	253	1.3	157	0.9	96	2.9
Perforated uterus	191	1.0	156	0.9	35	1.1
Anesthesia	14	0.1	14	0.1	0	—
Shock	1	†	0	—	1	†
Retained tissue	668	3.3	60	0.4	608	18.7
Failure	41	0.2	9	0.1	32	1.0
Lacerated cervix	38	0.2	36	0.2	2	0.1
Other	45	0.2	20	0.1	25	0.8
Unspecified	3	†	2	†	1	†
Total complications	1,441	7.2	510	3.0	931	28.6
Total abortions	199,569		167,012		32,557	
<b>July 1, 1971-June 30, 1972</b>						
Hemorrhage	379	1.1	140	0.5	239	4.3
Infection	501	1.5	259	0.9	242	4.3
Perforated uterus	383	1.2	324	1.2	59	1.1
Anesthesia	26	0.1	21	0.1	5	0.1
Shock	10	†	2	†	8	0.1
Retained tissue	957	2.9	116	0.4	841	15.1
Failure	108	0.3	14	0.1	94	1.7
Lacerated cervix	69	0.2	60	0.2	9	0.1
Other	111	0.3	62	0.2	49	0.9
Unspecified	14	†	9	†	5	0.1
Total complications	2,558	7.7	1,007	3.7	1,551	27.8
Total abortions	331,525		275,629		55,696	

\* Note: Source of information: Weekly Reports.

† Less than 0.05.

TABLE 3-12. Complication Rates per 1000 Abortions by Type and Method of Termination, New York City

Type of complication	Method of termination				
	Total	Dilatation and curettage	Suction	Saline	Hysterectomy
<b>July 1, 1970-June 30, 1971*</b>					
Hemorrhage	1.5	1.3	0.8	5.0	4.9
Infection	1.9	1.1	0.8	7.6	13.7
Perforated uterus	1.5	1.8	1.6	0.1	6.9
Anesthesia	0.1	0.1	0.1	0.2	1.0
Shock	0.1	0.1	†	0.3	1.0
Retained tissue	2.2	0.6	0.5	13.4	2.0
Failure	0.5	†	0.1	3.6	—
Lacerated cervix	0.2	0.3	0.2	0.1	1.0
Other	0.5	0.4	0.4	1.0	3.9
Unspecified	0.1	0.2	†	0.2	—
Total	8.5	5.9	4.4	31.6	34.3
<b>July 1, 1971-June 30, 1972</b>					
Hemorrhage	0.9	0.6	0.3	5.2	—
Infection	1.3	0.3	1.1	3.7	9.0
Perforated uterus	1.0	1.5	0.9	0.2	4.5
Anesthesia	0.1	0.1	0.1	—	—
Shock	†	—	—	†	—
Retained tissue	3.3	0.2	0.5	24.7	—
Failure	0.2	†	0.1	1.3	—
Lacerated cervix	0.2	0.2	0.2	0.1	—
Other	0.2	†	0.1	0.8	6.0
Unspecified	†	—	†	†	—
Total	7.2	3.0	3.2	36.1	19.5
<b>July 1, 1970-June 30, 1972</b>					
Hemorrhage	1.1	0.9	0.5	5.1	3.0
Infection	1.5	0.7	1.0	5.3	11.9
Perforated uterus	1.2	1.6	1.1	0.2	5.9
Anesthesia	0.1	0.1	0.1	0.1	0.6
Shock	†	†	†	0.1	0.6
Retained tissue	2.9	0.4	0.5	20.1	1.2
Failure	0.3	†	0.1	2.3	—
Lacerated cervix	0.2	0.3	0.2	0.1	0.6
Other	0.3	0.2	0.2	0.9	4.7
Unspecified	†	0.1	†	0.1	—
Total	7.7	4.3	3.7	34.2	28.5

\* Note: Source of information: Weekly Reports.

† Less than 0.05.

Source: Pakter et al., "A Review of Two Years' Experience in New York City With the Liberalized Abortion Laws," reproduced in The Abortion Experience, Psychological & Medical Impact, 47, 61 (H. Osofsky & J. Osofsky ed. 1973).

D. Recidivism Rate Associated With Performance of Abortions on Adolescents

37. With respect to the following quotation, defendants request that you admit that:

- a. The quoted material actually appears in the cited journal as it is reproduced here;
- b. The journal in which the quoted material appears is a reliable medical or scientific authority; and

c. The quoted material's factual statements are correct:

Data have accumulated on the recidivism rate for unwanted pregnancy and its relationship to nonuse of contraceptives. Sarrel<sup>4</sup> reported in a study of teen-age pregnancy that of 63 primigravidas [persons experiencing their first pregnancies] who delivered an infant out of wedlock in 1963, 36 delivered another in 1964. In a follow-up of 100 teen-age (13- to 17- year old) unwed mothers over a five year period, he found a total

Note: The footnoted reference is

4. Sarrel, P. "The University Hospital and the Teen-age Unwed Mother," 57 American Journal of Public Health 8:1308 (1967).

of 349 pregnancies and nine abortions (1959-1964); only five girls did not become pregnant again . . . .

We have defined the adolescent as a person at high risk, because of psychological, developmental and family issues which seem to be etiological in the pregnancy and which produce a high recidivism rate . . . .

Source: Nadelson, "Abortion Counselling: Focus on Adolescent Pregnancy," 54 Pediatrics 6: 765, 765-66 (1974).

38. In a study of 150 unwed girls residing in four maternity homes in Los Angeles the investigators reported on the incidence of

repeat unwed pregnancy as quoted below. With respect to the following quotation, defendants request that you admit that:

- a. The quoted material actually appears in the cited journal as it is reproduced here;
- b. The journal in which the quoted material appears is a reliable medical or scientific authority; and
- c. The quoted material's factual statements are correct:

Table IX. Incidence of repeat unwed pregnancy. Answer to question, "Is this your first pregnancy?"

	St. Anne's	Booth	Big Sister	Crittenton	Total	%
Yes	41	50	17	27	135	91.7
No	3	4	7	-	14	9.3

One startling point to come out of this study is revealed in Table IX. We are aware of the variability of the incidence of repeat unwed pregnancies and the difficulties in obtaining accurate figures. We have felt that

incidence was under 5 per cent. Hence, we were quite unprepared for this figure of 9.3 per cent "repeaters" in a random sample of 150 unwed pregnancies . . . .

Source: Von Her Ahe, "The Unwed Teen-age Mothers," 104 American Journal of Obstetrics and Gynecology 2: 279, 282, 284 (1969).

39. In a study of fifty women receiving abortions at the University of California-San Francisco, the investigators reported on the incidence of previous induced abortions as quoted below. With respect to the following quotation, defendants request that you admit that:
- a. The quoted material actually appears in the cited journal as it is reproduced here;

b. The journal in which the quoted material appears is a reliable medical or scientific authority; and  
c. The quoted material's factual statements are correct:

PRIOR PREGNANCIES

None	19
Term or premature delivery	25
Spontaneous abortion only	1
Induced abortion	6

Source: Margolis et al., "Therapeutic Abortion Follow-up Study," 110 American Journal of Obstetrics and Gynecology 2:243, 244 (1971).

E. Facts Related to Juvenile And Adolescent Pregnancies.

40. In a recent sociological study, the author reported statistics

concerning the living arrangements of the adolescent at the time of her pregnancy as compared with her classmates. This data is quoted below. With respect to the following quotation, defendants request that you admit that:

- a. The quoted material actually appears in the cited journal as it is reproduced here;
- b. The journal in which the quoted material appears is a reliable medical or scientific authority; and
- c. The quoted material's factual statements are correct:

Table 2. Percent Distribution Of Adolescent Mothers and Classmates by Selected Characteristics,  
Baltimore, 1966-1972

Characteristics	Adolescent mothers (N= 323)	Classmates (N= 221)
Living arrangements of unmarried adolescents at Time:		
Lived with both parents		
Lived with mother	51	59
Lived with father	38	32
Lived with neither parent	3	2
	8	7

Source: Furstenberg, "The Social Consequences of Teenage Parenthood," 8 Family Planning Perspectives 4:148, 149 (1976).

41. In a follow-up study of fifty adolescent females done two years after their abortions, the investigators reported the incidence of households without a father present as quoted below. With respect to the following quotation, defendants request that you admit that:

- a. The quoted material actually appears in the cited journal as it is reproduced here;
- b. The journal in which the quoted material appears is a reliable medical or scientific authority; and
- c. The quoted material's factual statements are correct:

The girl's father was absent in 37% of instances; nine fathers had been absent before the abortion, four because of death and five because of separation.

Source: Cvejic, et al., "Follow-up of 50 Adolescent Girls 2 Years After Abortion," 116 Canadian Medical Association Journal 1:44, 44 (1977).

42. In a paper discussing pregnancy resolution decisions of adolescents, the author compared several aspects of the home situation of deliverers and aborters. Included in that discussion was the following quote. With respect to the following quotation, defendants request that you admit that:
- a. The quoted material actually appears in the cited journal as it is reproduced here;
  - b. The journal in which the quoted material appears is a reliable medical or scientific authority; and
  - c. The quoted material's factual statements are correct:

Previous studies have frequently indicated that the "absent father" is a crucial causative factor in illegitimate pregnancy,<sup>10,11</sup> but failed to take into account the reason for his absence from the home. This oversight may be a critical one, since the present study showed that although

Note: Footnoted references are

10. Banglow, Peter, et al., "Some Psychiatric Aspects of Illegitimate Pregnancy in Early Adolescence," 38 American Journal of Orthopsychiatry, 672-687 (1968).
11. Gottschalk, L.A., et al., "Psychosocial Factors Associated with Pregnancy in Adolescent Girls: A Preliminary Report," 138 Journal of Nervous and Mental Disease, 524-534 (1964).

half of both deliverers' and abortors' homes had no father, a significant proportion of the aborters reported that their absent fathers were dead, whereas the deliverers' fathers were more likely to be living elsewhere. One of every four aborters claimed that her father was deceased, or twice the number reported by the deliverers.

Source: Ficshman, "The Pregnancy-Resolution Decision of Unwed Adolescents," 10 Nursing Clinics of North America 2:217, 220 (1975).

43. Pregnancies in girls under 16 years of age have become more common in recent years.
44. The number of female adolescents who delivered their first child in Boston City Hospital increased by 45 per cent between 1953 and 1956.

45. As of 1968, one half of all obstetric cases involved patients less than 20 years of age.
46. The following table summarizes the distribution of pregnancies in girls under 16 years of age as determined by twelve studies conducted between the years 1935 and 1967. With respect to this table, defendants request that you admit that:
- The quoted material actually appears in the cited journal as it is reproduced here;
  - The journal in which the quoted material appears is a reliable medical or scientific authority; and
  - The quoted material's factual statements are correct:

Table 49. AGE INCIDENCE OF PREGNANCY IN ADOLESCENTS  
UNDER 16 YEARS OF AGE (12 SERIES OF CASES)

REPORTER	YEAR	AGE					
		UNDER	11	12	13	14	15
Aznar & Bennett	1961	0	0	1	19	99	312
Briggs et al.	1962	0	0	3	7	26	77
Clough	1958	0	0	0	1	8	47
Hacker et al.	1952	0	0	4	12	52	141
Marchetti & Menaker	1960	0	0	12	19	77	163
Morrison	1953	0	0	4	39	165	467
Posner & Pulver	1935	0	0	2	10	26	62
Poliakoff	1958	0	0	3	11	77	208
Semmens & McClamory	1960	0	1	0	7	16	88
Sinclair	1952	0	0	1	3	47	168
Clark et al.	1962	1	0	1	8	31	80
Clark et al.	1967	0	2	5	14	50	109
No. each age		1	3	36	150	674	1822
Total pregnancies under 16 years of age							2686*

\*Total does not include 16 year olds.

47. The following table records the incidence and outcomes of juvenile pregnancies in girls under eleven years of age. With respect to this table, defendants request that you admit that:

- a. The quoted material actually appears in the cited journal as it is reproduced here;
- b. The journal in which the quoted material appears is a reliable medical or scientific authority; and
- c. The quoted material's factual statements are correct:

48. The author of the medical textbook from which the table appearing in paragraph forty seven is reproduced included in his discussion of juvenile pregnancy

Table 51. 21 JUVENILE PREGNANCIES UNDER 11 YEARS OF AGE

REPORTER	YEAR	CHILD'S AGE		TYPE OF DELIVERY	CONDITION OF OFFSPRING
		AT MENARCHE	AT DELIVERY		
von Mandelsoo	1658	3	6-7/12	—	—
Sue	1779	2	8-9/12	—	Stillborn
von Haller	1784	2	8-9/12	Forceps	Stillborn
de la Sagra	1821	10	10-9/12	—	—
d'Outrepont	1826		9	Aborted	3 months
Carus	1842	2	8	—	—
Smith	1848	2	8-10/12	Normal	Stillborn
Rowlett	1834	1	10	Normal	Normal
Curtis	1863	9	10-8/12	Normal	—
Molitor	1878	4	8-9/12	Aborted	3 months
Dodd	1881	1	9-8/12	—	Neonatal death
Dodd	1882	1	8-10/12	—	Born with pubic hair and large breasts
Gleave	1895	5	10-1/12	—	Neonatal death
Pittman	1908		9	—	—
Chaschinsky & Jerschow	1933	3-4	6-9/12	—	Stillborn
Keane	1933		6-8/12	—	—
Comby	1938	3	8-3/12	—	—
Escomel	1939	8 mo.	5-8/12	Cesarean Section	Normal
Colareta	1957		9-8/12	Normal	Normal
Dodge	1958	8-8/12	9-6/12	Normal	Normal
Clark et al.	1962		10	—	—

several comments about the data included in the table. Included in that discussion was the following quote.

With respect to the following quotation, defendants request that you admit that:

- a. The quoted material actually appears in the cited journal as it is reproduced here;
- b. The journal in which the quoted material appears is a reliable medical or scientific authority; and
- c. The quoted material's factual statements are correct;
- d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgment and opinions:

Undoubtedly, there are more than those [juvenile pregnancies] noted, particularly in the 10 year old group.

Source for statements contained in paragraphs 43-48: J.W. Huffman, the Gynecology of Childhood and Adolescence, ch. 27, W.B. Saunders (1968).

- 49. Girls as young as nine years of age have sought birth control advice from Planned Parenthood clinics.

Source: Interview with Dr. Gerry Oliva, medical director of Planned Parenthood affiliate in San Francisco, California, reported in Los Angeles Herald-Examiner, October 25, 1975, p.-A-3, col. -1.

II. EXPERT OPINION CONCERNING  
ASPECTS OF PREGNANCY AND  
ABORTION EPISODES EXPERIENCED  
BY FEMALE ADOLESCENTS.

- A. Adolescent Attitudes  
Towards Pregnancy  
And Abortion
1. General Psychological  
Observations

50. In a study comparing psychological sequelae of abortion in women who did not plan to have more children with women who hoped to bear children in the future, the investigators made several findings concerning the attitudes of the women toward their abortions. Included among these findings were those quoted below. With respect to the following

quotation, defendants request that you admit that:

- a. The quoted material actually appears in the cited journal as it is reproduced here;
- b. The journal in which the quoted material appears is a reliable medical or scientific authority; and
- c. The quoted material's factual statements are correct;
- d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

The data suggest that, for the woman who plans to have children, abortion is an ambivalent

event . . . . [I]t is suggested  
that the ambivalence of women who  
have abortions while still  
planning for children in the  
future is of clinical importance.  
[emphasis in original].

Source: Greenglass, "Therapeutic  
Abortion, Fertility Plans,  
and Psychological Sequelae,"  
47 American Journal of  
Orthopsychiatry 1: 119, 119,  
124 (1977).

51. In a study comparing the  
psychological sequelae of abortion  
in women who did not plan to have  
more children with women who hope  
to bear children in the future,  
several differences between the  
two groups were noted. Included  
among these differences were those  
quoted below.

With respect to the following  
quotation, defendants request that  
you admit that:

- a. The quoted material actually  
appears in the cited journal as it  
is reproduced here;
- b. The journal in which the  
quoted material appears is a  
reliable medical or scientific  
authority; and
- c. The quoted material's factual  
statements are correct;
- d. The quoted material's  
statements of expert judgment and  
opinion are statements which  
reputable and competent experts in  
the field have made after careful  
professional investigation and  
represent generally accepted  
professional judgments and  
opinions:

The situation is far different,  
however, for women who opt for

abortion because of overwhelming immediate circumstances, but who hope to bear children in the future. Their conflict seems likely to result in some psychological discomfort, which would subsequently be manifested in various neurotic tendencies or reactions.

Source: Greenglass, "Therapeutic Abortion, Fertility Plans, and Psychological Sequelae," 47 American Journal of Orthopsychiatry 1: 119, 120 (1977).

2. Observations Concerning Psychology of Adolescence
52. With respect to the following quotation, defendants request that you admit that:

a. The quoted material actually appears in the cited journal as it is reproduced here;  
b. The journal in which the quoted material appears is a reliable medical or scientific authority; and  
c. The quoted material's factual statements are correct;  
d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

1. Adolescents tend to show a special intensity and volatility of feeling. Certain of their emotions are extremely strong and extremely changeable.

2. Closely allied to his intensity of feeling is the adolescent's need for frequent and immediate gratification.

3. Reality testing is not as effective in the adolescent as in the adult. The adolescent is particularly likely to be unaware of the probable consequences of his actions and to misunderstand the feelings or behavior of others . . . .

If we examine the failures of reality testing, we find them to be limited to situations in which the adolescent's relation to a parent or parent substitute is of primary importance.

4. There is in adolescence a failure of self-criticism. This is perhaps only a special instance

of the failure of reality testing. This quality is best described as an inability to take another person's point of view and thus "get off and look at oneself." It is one of the factors permitting the adolescent to behave and feel in an impulsive, immoderate, and unrealistic way.

5. The adolescent has unawareness of the world about him different from that of the adult.

Source: Fountain, "Adolescent Into Adult: An Inquiry," 9 Journal of the American Psychoanalytic Association 417, 419-22, 426 (1961).

53. With respect to the following quotation, defendants request that you admit that:

- a. The quoted material actually appears in the cited journal as it is reproduced here;
- b. The journal in which the quoted material appears is a reliable medical or scientific authority; and
- c. The quoted material's factual statements are correct;
- d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

During adolescence, the physiological and maturational changes which occur lead to extremely strong emotional reactions . . . [and the adolescent] lacks experience with

her feelings and does not have the emotional control of an adult.

Source: Gedan, "Abortion Counseling with Adolescents," 74 American Journal of Nursing 10: 1856, 1856 (1974).

54. In a follow-up study of forty adolescents performed one month or more after their abortions, the investigators drew several conclusions. Included among these conclusions was the one quoted below.

With respect to the following quotation, defendants request that you admit that:

- a. The quoted material actually appears in the cited journal as it is reproduced here;
- b. The journal in which the quoted material appears is a

reliable medical or scientific authority; and

c. The quoted material's factual statements are correct;

d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

What is specific to this age group is the lessened amount of adaptive mechanism with which to deal with these problems.

Source: Rosenthal and Rothchild,  
"Some Psychological  
Considerations in Adolescent  
Pregnancy and Abortion," 9  
Advances in Planned  
Parenthood 3-4: 60, 68 (1975).

55. With respect to the following quotation, defendants request that you admit that:

a. The quoted material actually appears in the cited journal as it is reproduced here;

b. The journal in which the quoted material appears is a reliable medical or scientific authority; and

c. The quoted material's factual statements are correct;

d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

When we see an adolescent or young adult, we are seeing an

individual in painful and extended crisis . . . In the crisis of pregnancy, the potential for regression or maturation is particularly dramatic.

Source: Polsby, "Unmarried Parenthood Potential for Growth," 9 Adolescence 34: 273, 275, 277 (1974).

3. Observations Concerning Psychological Effects of Abortions on Adolescents.

56. With respect to the following quotation, defendants request that you admit that:

- a. The quoted material actually appears in the cited journal as it is reproduced here;
- b. The journal in which the quoted material appears is a

reliable medical or scientific authority; and

- c. The quoted material's factual statements are correct;
- d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

Immediately available abortion may prevent some adolescents from accepting the reality of the pregnancy and working through a decision. The implications of this availability include the psychological toll of the denial, as well as the more pragmatic aspect that it may be less likely that a girl who had difficulty

acknowledging her sexuality, and has denied pregnancy will be able to accept the responsibility of contraceptive use to prevent future pregnancies.

This problem is brought into sharper focus by the large numbers of outpatient abortion facilities which do not have adequate preabortion counseling, and concern themselves with rapid turnover and large numbers of abortions, rather than quality care.

Source: Nadelson, "Abortion Counselling: Focus on Adolescent Pregnancy," 54 Pediatrics 6: 765, 768 (1974).

57. With respect to the following quotation, defendants request that you admit that:

- a. The quoted material actually appears in the cited journal as it is reproduced here;
- b. The journal in which the quoted material appears is a reliable medical or scientific authority; and
- c. The quoted material's factual statements are correct;
- d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

#### PREABORTION ANXIETY

A period of intense anxiety and ambivalence is often experienced in the 24-hour period of time prior to the abortion.

Source: Nadelson, "Abortion Counselling: Focus on Adolescent Pregnancy," 54 Pediatrics 6:765, 768 (1974).

58. With respect to the following quotation, defendants request that you admit that:
- a. The quoted material actually appears in the cited journal as it is reproduced here;
  - b. The journal in which the quoted material appears is a reliable medical or scientific authority; and
  - c. The quoted material's factual statements are correct;
  - d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and

represent generally accepted professional judgments and opinions:

#### AMBIVALENCE

Ambivalence is universal. It is related to the conflict between the positive aspects of conception and pregnancy versus the frustration and sadness about making a choice to terminate a pregnancy. Since ambivalence occurs as part of the developmental process of adolescence, it is especially prominent in this age group, and it is more difficult to assess its particular significance.

Source: Nadelson, "Abortion Counselling: Focus on Adolescent Pregnancy," 54 Pediatrics 6: 765, 767 (1974).

59. With respect to the following quotation, defendants request that you admit that:
- a. The quoted material actually appears in the cited journal as it is reproduced here;
  - b. The journal in which the quoted material appears is a reliable medical or scientific authority; and
  - c. The quoted material's factual statements are correct;
  - d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

For the adolescent, failure of resolution of the unwanted

pregnancy crisis can potentially arrest development progress. The message of pregnancy must be understood and taken seriously if repetition is to be avoided. It is important to remember that the pregnant adolescent is a child potentially bearing a child.

Source: Nadelson, "Abortion Counselling: Focus on Adolescent Pregnancy," 54 Pediatrics 6:765, 769 (1974).

4. Observations Concerning Adverse Psychological Effects of Abortion on Adolescents.

60. In a study of the postabortion courses of twenty-two unmarried pregnant adolescent females, the investigators made several findings concerning the

psychological and physical status of the girls following their abortions. Included among these findings were those quoted below. With respect to the following quotation, defendants request that you admit that:

- a. The quoted material actually appears in the cited journal as it is reproduced here;
- b. The journal in which the quoted material appears is a reliable medical or scientific authority; and
- c. The quoted material's factual statements are correct;
- d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

Our single most striking set of findings relates to the effects of the pregnancy and abortion experience upon the younger adolescents in the 14- to 17-year age span. Consequent symptom manifestations, even when only transient, tended to be more dramatic and more severe in this younger group. For example, we found here withdrawal from social relationships, preoccupation with feelings of "ugliness," severe crying spells upon seeing children or pregnant women, increased dependency on parents, radical changes in relationship patterns, one suicide attempt, and several fairly acute anniversary reactions. Even more, we were struck by the more pervasive long-range effects of the pregnancy and abortion experience upon these particular young women . . . .

Source: Wallterstein, et al.,  
"Psychosocial Sequelae of  
Therapeutic Abortion in Young  
Unmarried Women," 27 Archives  
of General Psychiatry 6: 828,  
832 (1972).

61. In a study of the postabortion courses of twenty-two unmarried adolescent females, the investigators made several findings concerning the psychological and physical status of the girls following their abortions. Included among these findings were those quoted below. With respect to the following quotation, defendants request that you admit that:

- a. The quoted material actually appears in the cited journal as it is reproduced here;
- b. The journal in which the quoted material appears is a

reliable medical or scientific authority; and

- c. The quoted material's factual statements are correct;
- d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

[Some girls] . . . were clearly thrown off their previous developmental course in ways which carried ominous implications for their prospects of achieving a consolidated adult integration and regained self-esteem as a woman.

Source: Wallerstein, et al.,  
"Psychosocial Sequelae of

Therapeutic Abortion in Young Unmarried Women," 27 Archives of General Psychiatry 6: 828, 832 (1972).

62. In a study of the postabortion courses of twenty-two unmarried pregnant adolescent females, the investigators made several findings concerning the psychological and physical status of the girls during their pregnancies and abortion decision episodes. Included among these findings were those quoted below. With respect to the following quotation, defendants request that you admit that:

- a. The quoted material actually appears in the cited journal as it is reproduced here;
- b. The journal in which the quoted material appears is a reliable medical or scientific authority; and

c. The quoted material's factual statements are correct;  
d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

In accordance with the findings of others,<sup>1</sup> an overwhelming number (specifically, 19 out of the 22),

Note: The footnoted reference 1 is:

Marder, "Psychiatric Experience with a Liberalized Abortion Law," 126 American Journal of Psychiatry 1230-1235 (1970).

reported experiencing moderate to severe emotional distress during the period of pregnancy.

Source: Wallerstein, et al.,  
"Psychosocial Sequelae of Therapeutic Abortion in Young Unmarried Women," 27 Archives of General Psychiatry 6: 828, 832 (1972).

63. With respect to the following quotation, defendants request that you admit that:

- a. The quoted material actually appears in the cited journal as it is reproduced here;
- b. The journal in which the quoted material appears is a reliable medical or scientific authority; and
- c. The quoted material's factual statements are correct;

d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

Overall it is clear that the pregnancy and abortion experience in the younger and less mature is considerably heightened risk [sic], a point of potential major maturational skewing.

Source: Wallerstein, et al.,  
"Psychosocial Sequelae of Therapeutic Abortion in Young Unmarried Women," 27 Archives of General Psychiatry 6: 828, 832 (1972).

5. Observations Concerning Pre  
and Post Abortion Relationships  
Between Parents and Their  
Pregnant Adolescent Children.

64. In a paper discussing the psychological aspects of pregnancy and abortion in adolescents, the author discussed the adolescent's motivation for becoming pregnant. Included in that discussion were the comments quoted below. With respect to the following quotation, defendants request that you admit that:

- a. The quoted material actually appears in the cited journal as it is reproduced here;
- b. The journal in which the quoted material appears is a reliable medical or scientific authority; and
- c. The quoted material's factual statements are correct:

d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

The primary motivation for her was rather the wish to become closer to her own mother by becoming a mother herself . . . [emphasis in original]. Motherhood, therefore, is not the goal of the early adolescent female, but rather reuniting with her own mother by becoming like her is a significant motivation for pregnancy at this stage.

Source: Hatcher, "Understanding Adolescent Pregnancy and

Abortion," 3 Primary Care 3:  
407, 414-415 (1976).

65. In a study of the postabortion courses of twenty-two unmarried pregnant adolescent females, the investigators made several findings concerning the psychological and physical status of the girls during their pregnancies and abortion decision episodes. Included among these findings were those quoted below.
- With respect to the following quotation, defendants request that you admit that:
- The quoted material actually appears in the cited journal as it is reproduced here;
  - The journal in which the quoted material appears is a reliable medical or scientific authority; and

- The quoted material's factual statements are correct;
- The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

[For some of the girls] the central emotional issue revolved primary around their deception of their families and the burden of secrecy . . . [W]e did find that where secrecy from the family was insisted upon, this burden of guilt was a continuing source of difficulty.

Source: Wallerstein, et al.,  
"Psychological Sequelae of

Therapeutic Abortion in Young Unmarried Women," 27 Archives of General Psychiatry, 6:828, 829, 831 (1972).

66. In an article concerning abortion counseling with adolescents, an experienced psychiatric nurse-therapist presented an extensive discussion of her experience with counseling over 400 girls since the liberalization of abortion laws. Included in that discussion were the statements quoted below. With respect to the following quotation, defendants request that you admit that:
- a. The quoted material actually appears in the cited journal as it is reproduced here;
  - b. The journal in which the quoted material appears is a reliable medical or scientific authority; and

- c. The quoted material's factual statements are correct;
- d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

Fantasies about her parents' feelings may be exaggerated. Adolescents who are feeling particularly guilty may expect severe retaliation from parents. About 20 per cent of my patients have expressed fears of beating or being struck and, although there was a history of physical violence in a few of the families involved, such fears have proven unfounded.

Source: Gedan, "Abortion Counseling with Adolescents," 74 American Journal of Nursing, 10: 1856, 1857 (1974).

67. In a report of a follow-up study of fifty adolescent females that underwent an abortion at the adolescent clinic of the Montreal Children's Hospital, the investigators made several statements and conclusions. Among these statements and conclusions were those quoted below.

With respect to the following quotation, defendants request that you admit that:

- a. The quoted material actually appears in the cited journal as it is reproduced here;
- b. The journal in which the quoted material appears is a reliable medical or scientific authority; and

- c. The quoted material's factual statements are correct;
- d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

The decision-making process is the most difficult aspect of the experience for the girl, the family and the clinic . . . [footnote omitted]. Our hospital clinic requires parental consent for individuals under the age of 18 to undergo an operation. Much of the initial anxiety for the girl is related to having to tell her parents about the pregnancy.

We have found that the girl who makes her decision in collaboration with her parents seems to be the best prepared.

Source: Cvejic, et al., "Follow-up of 50 Adolescent Girls 2 Years After Abortion," 116 Canadian Medical Association Journal, 1:44, 45 (1977).

68. In a follow-up study of forty adolescents one month or more after their abortions, the investigators included the table reproduced below.

With respect to the following quotation, defendants request that you admit that:

- a. The quoted material actually appears in the cited journal as it is reproduced here;
- b. The journal in which the quoted material appears is a

reliable medical or scientific authority; and

- c. The quoted material's factual statements are correct;
- d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

Who Wanted the Abortion?

Patient	Parent	Number
Refused	Strongly wanted	4
Reluctant		
coerced	Strongly wanted	3
Ambivalent	Wanted	7
Wanted	Wanted	17
Wanted	Reluctant	8
Wanted	Refused	1

Source: Rosenthal and Rothchild, "Some Psychological Considerations in Adolescent Pregnancy and Abortion," 9 Advances in Planned Parenthood, 3-4: 60, 65 (1975).

69. In a study of the short and long-term effects of abortion on the pregnant teenager carried out at the Adolescent Unit of the Montreal Children's Hospital, a chart and discussion of the data concerning various follow-up statistics included the findings quoted below.

With respect to the following quotation, defendants request that you admit that:

- a. The quoted material actually appears in the cited journal as it is reproduced here;
- b. The journal in which the quoted material appears is a reliable medical or scientific authority; and

c. The quoted material's factual statements are correct;  
d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

Table I—Data obtained at short-and long-term follow-up compared with pre-abortion status

	Pre-abortion	Post-abortion, up to 6 weeks	Post-abortion, 6 weeks to 1 year
Family support			
Present	38	39	47
Lacking	12	11	3

In 76% of cases the families supported the girls through the crisis period, but 24% did not. In 16% of the cases, follow-up of one year revealed an improvement in the relationship between the girl and her family.

Source: Lipper, et al., "Abortion and the Pregnant Teenager," 109 Canadian Medical Association Journal 852, 854-855 (1973).

6. Observations Concerning the Importance to Pregnant Female Adolescents of Counseling and Parental Involvement in Counseling.

70. In a chapter dealing with juvenile and adolescent pregnancies contained in the medical text The Gynecology of Childhood and Adolescence, the author presents the discussion of the management of pregnant adolescents quoted below.

With respect to the following quotation, defendants request that you admit that:

- a. The quoted material actually appears in the cited journal as it is reproduced here;
- b. The journal in which the quoted material appears is a reliable medical or scientific authority; and
- c. The quoted material's factual statements are correct;
- d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in

the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

This discussion of treatment will be concerned with the management of pregnant adolescents as defined in Table 50 [13 to 16 years olds]. These girls tend to come from a poor environment and, because of inadequate nutrition, are usually in need of superior antepartum care. The diagnosis of pregnancy is an unmarried adolescent brings with it distress and fear. It is my custom, once I feel certain of the diagnosis, to ask the girl's mother to leave the examining room. In the presence of my nurse, I tell the patient why I think she is pregnant, have

her agree that she could be and suggest that she let me tell her mother.

In talking to the mother emphasis is placed on the girl's need for sympathy, understanding and gentleness. It is not a time for reproaches or upbraiding. Tender, loving care will do more than anything else to help her overcome the stress of the antepartum period. The adolescent girl is not prepared physiologically or psychologically for the load of pregnancy and she will need all the help she can get from her family, social workers, nurses and physicians not only during her pregnancy and labor but, also, during the period of adjustment afterward.

The social worker is an indispensable part of the team who cares for the girl. The family

situation is investigated and help is obtained, if necessary, in order that the patient may have an adequate diet and suitable home care. Often an interested caseworker can win the girl's confidence and do more than her family, whom she may tend to shut out, in helping her cope with the emotional problems related to her pregnancy.

Ideally, psychiatric consultation is available for both the girl and her mother. Unfortunately, many private patients withdraw from psychiatric help and many of the girls in the indigent group do not report for examination until they are almost through their antepartum course . . . .

Most unmarried adolescent private patients in urban areas go to some other locality for their

delivery. If they are going to do so, it is advisable for them to be under the care of their physician who is to deliver them by the 20th week of gestation. If an adolescent is to go to an institution for unmarried girls, the family physician may well want to investigate the obstetric standing of those who are on the staff of the institution to which she is going. Private patients who remain at home for delivery are seen outside regular office hours. Those who are under the care of a pediatrician will have confidence in him and are more likely to follow his guidance than they are that of an obstetrician who is a stranger. The obstetrician and pediatrician, in such a case, may well work together, the pediatrician taking

the lead in gaining the girl's cooperation and in directing most of her care . . . .

Source: J. W. Huffman, The Gynecology of Childhood and Adolescence 552-53, W. B. Saunders (1968).

71. With respect to the following quotation, defendants request that you admit that:
- a. The quoted material actually appears in the cited journal as it is reproduced here;
  - b. The journal in which the quoted material appears is a reliable medical or scientific authority; and
  - c. The quoted material's factual statements are correct;
  - d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in

the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

#### PREABORTION COUNSELLING

Preabortion counselling is a crucial aspect of the abortion procedure [emphasis in the original].

#### Abortion Motivation

Who wants the abortion? It is not infrequent for an adolescent to be pushed by family or friends to make a decision when she is uncertain. The counsellor must help her to explore the nature of the pressures, so that she may make her own decision.

The adolescent who is involved in other critical developmental issues, may be desirous of an abortion because her family wants the opposite, or vice versa. These issues must be clarified. In addition, the counsellor must remember that the adolescent will continue to live with her family, so that helping her with her own decision is not enough. Work with the family is important in order (1) to avoid repetition of the unwanted pregnancy, which is most frequently a distress signal for the adolescent; and (2) to work out problems reflected by the mutual acknowledgment of the adolescent's sexuality.

Source: Nadelson, "Abortion Counselling: Focus on Adolescent Pregnancy," 54 Pediatrics 6: 765, 767 (1974).

72. With respect to the following quotation, defendants request that you admit that:

- a. The quoted material actually appears in the cited journal as it is reproduced here;
- b. The journal in which the quoted material appears is a reliable medical or scientific authority; and
- c. The quoted material's factual statements are correct;
- d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

The Supreme Court decision permitting abortion in the first

trimester of pregnancy has resulted in a shift from preabortion psychiatric counselling to quick turnover at the expense of quality care. Adolescent girls, a high-risk population, should have experienced, nonjudgmental counselling in order to: (1) work through their feeling about pregnancy so that they can be reach the best decision for themselves; (2) cope with stress, guilt, and ambivalence they feel; (3) understand the psychological reasons for their non-use of contraceptives and thus avoid future unwanted pregnancies; (4) improve family relationships; and (5) understand the procedure itself.

Source: Nadelson, "Abortion  
Counselling: Focus on

"Adolescent Pregnancy," 54  
Pediatrics 6: 765, 765 (1974).

73. In a follow-up study of forty-one girls in early adolescence carried out six months after their abortions, the investigators made several comments concerning the results of the study. Included among these comments was a discussion of the physician's role in the abortion decision making process as quoted below.

With respect to the following quotation, defendants request that you admit that:

- a. The quoted material actually appears in the cited journal as it is reproduced here;
- b. The journal in which the quoted material appears is a reliable medical or scientific authority; and

- c. The quoted material's factual statements are correct;
- d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

The role of any physician, beyond making or confirming the diagnosis, should be to explore the patient's feelings and discuss the available alternatives. The patient and her parents should, then, consider further what decision they want to take, ideally involving the male partner and his parents.

Source: Perez-Reyes and Falk,  
"Follow-up After Therapeutic  
Abortion in Early  
Adolescence," 28 Archives of  
General Psychiatry, 120, 126  
(1973).

74. With respect to the following quotation, defendants request that you admit that:
- a. The quoted material actually appears in the cited journal as it is reproduced here;
  - b. The journal in which the quoted material appears is a reliable medical or scientific authority; and
  - c. The quoted material's factual statements are correct;
  - d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful

professional investigation and represent generally accepted professional judgments and opinions:

Significant people in the adolescent's family must be included in some way in the counseling.... Skilled counseling can help the family grow and change.

Source: Gedan, "Abortion Counseling with Adolescents," 74 American Journal of Nursing, 10: 1856, 1857 (1974).

75. In a follow-up study of fifty women three to six months post-abortion, the investigators made several comments concerning the results of the study. Included among these comments was the statement about adolescents quoted below.

With respect to the following quotation, defendants request that you admit that:

- a. The quoted material actually appears in the cited journal as it is reproduced here;
- b. The journal in which the quoted material appears is a reliable medical or scientific authority; and
- c. The quoted material's factual statements are correct;
- d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

Of particular concern to us, however, are the pregnant girls under 18. Although our study group was small, we encountered a great deal of ambivalence and guilt. As a result, we felt that especially careful evaluation and counseling should be provided for them and their families. The alternative of a teen-ager carrying a pregnancy to term presents great difficulties for the teen-ager and her child, and the delicate balancing of risks often requires the most expert collaborative effort of physician, psychiatrist, and social worker.

Source: Margolis, et al.,  
"Therapeutic Abortion  
Follow-up Study," 110  
American Journal of  
Obstetrics and Gynecology,"  
2: 243, 246 (1971).

76. With respect to the following quotation, defendants request that you admit that:
- a. The quoted material actually appears in the cited journal as it is reproduced here;
  - b. The journal in which the quoted material appears is a reliable medical or scientific authority; and
  - c. The quoted material's factual statements are correct;
  - d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

Counseling of young pregnant girls and their sexual partners can assist them to reach mature,

rational decisions by helping them to understand their motives for childbearing, focus on the realities of a given situation, and take into account their capabilities and feelings of responsibility. If a girl and/or her family are opposed to abortion solely because of misinformation or irrational fears, intensive counseling might enable them to accept the procedure, and thus achieve the postponement of motherhood.

Source: Fischman, "The Pregnancy - Resolution Decision of Unwed Adolescents," 10 Nursing Clinic of North America, 2: 217, 225 (1975).

77. With respect to the following quotation, defendants request that you admit that:

- a. The quoted material actually appears in the cited journal as it is reproduced here;
- b. The journal in which the quoted material appears is a reliable medical or scientific authority; and
- c. The quoted material's factual statements are correct;
- d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

Emotional counseling is an essential part of care for the woman who elects to terminate her pregnancy.

Source: Gedan, "Abortion Counseling with Adolescents," 74 American Journal of Nursing, 10: 1856, 1856 (1974).

78. With respect to the following quotation, defendants request that you admit that:

- a. The quoted material actually appears in the cited journal as it is reproduced here;
- b. The journal in which the quoted material appears is a reliable medical or scientific authority; and
- c. The quoted material's factual statements are correct;
- d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted

professional judgments and opinions:

. . . appropriate psychological intervention during pregnancy and the post abortion period may provide the impetus for maturation to the next developmental stage and more responsible behavior.

Source: Hatcher, "Understanding Adolescent Pregnancy and Abortion," 3 Primary Care, 3: 407, 423 (1976).

79. With respect to the following quotation, defendants request that you admit that:

- a. The quoted material actually appears in the cited journal as it is reproduced here;
- b. The journal in which the quoted material appears is a reliable medical or scientific authority; and

c. The quoted material's factual statements are correct;  
d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

The request for abortion or the abortion itself may represent an opportunity for simple psychotherapeutic intervention, which may be of vital importance to the woman's subsequent mental health.

Source: Raphael, "Psychosocial Aspects of Induced Abortion: Its Implications for the Woman, Her Family and Her Doctor: Part 1", 2 The

Medical Journal of Australia,  
1: 35, 35 (1972).

80. With respect to the following quotation, defendants request that you admit that:
- a. The quoted material actually appears in the cited journal as it is reproduced here;
  - b. The journal in which the quoted material appears is a reliable medical or scientific authority; and
  - c. The quoted material's factual statements are correct;
  - d. The quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional investigation and represent generally accepted professional judgments and opinions:

Morbidity is somewhat higher with mid trimester pregnancy termination including coagulation disturbances.<sup>18,19</sup> Mid trimester abortion is a more emotionally stressful experience, and adolescents are particularly prone to adverse psychological reactions. As it is often the

Note: The footnoted references are

18. Wentz, et al., "Methodology: Premature Pregnancy Termination," 28 Obstetrics and Gynecology Surveys, 2 (1973).

19. Youngs, et al., "The Johns Hopkins Adolescent Pregnancy Program," Urban Health - The Journal of Health Care in the Cities, at 40 (1975).

younger, more immature adolescents who delay in seeking professional help, supportive counselling is indicated during and after the procedure.

Source: Youngs and Niebyl,  
"Adolescent Pregnancy and  
Abortion," 56 Medical Clinics  
of North America, 9: 1419,  
1426 (1975).

By their attorneys,

FRANCIS X. BELLOTTI  
ATTORNEY GENERAL

Garrick F. Cole

Thomas R. Kiley

---

Michael B. Meyer  
Assistant Attorneys General  
Government Bureau  
Department of the Attorney General  
One Ashburton Place  
Boston, Massachusetts 02108  
727-1004

On the requests:  
Lawrence Gottlieb  
Student Intern

[Title omitted in printing]

First Amendment to Defendant's First  
Set of Requests for Admissions to  
Plaintiff Gerald Zupnick

To: Gerald Zupnick, M.D.  
c/o Parents Aid Society, Inc.  
673 Boylston Street  
Boston, Massachusetts

Defendants have become aware of a typographical error in their First Set of Requests for Admissions to Plaintiff Gerald Zupnick filed on August 1, 1977. Defendants therefore request that you make the following change in the original Request for Admissions.

Paragraph No. 52, Part 5, which appears at the top of page 32 of the First Set of Requests for Admissions should read as follows:

5. The adolescent has an awareness of the world about him different from that of the adult.

By their attorneys,

FRANCIS X. BELLOTTI  
ATTORNEY GENERAL

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Garrick F. Cole

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Thomas R. Kiley

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Michael B. Meyer  
Assistant Attorneys General  
Government Bureau  
Department of the Attorney  
General  
One Ashburton Place  
Boston, Massachusetts 02108  
(617) 727-1004

[Title omitted in printing]

Defendants' Motion for Leave  
to Contact Members of Plaintiff Class

Defendants move that the Court issue an order in the form attached permitting them to contact members of the plaintiff class by means of the letter attached to this motion as an exhibit and marked "A" for the purpose of requesting their participation in the survey described in the letter and to be conducted through use of the instrument attached to this motion as an exhibit and marked "B". In support of their motion, defendants point out that the Code of Professional Responsibility, DR 7-104(A)(1) and EC 7-18, prohibit defendants' counsel from communicating with members of the class represented by counsel, and defendants assume that named plaintiffs' counsel represent absent mem-

bers of the class within the meaning of the Code's prohibitions. See generally 3B J. Moore, Federal Practice, 23.75 (2 ed. 1977).

Pursuant to Local Rule 12, defendants state that they do not wish to file a memorandum in support of this motion but would like to explain the purpose of the survey orally should the Court think such a presentation appropriate. In light of the pressing pre-trial schedule defendants are working under, they request that the Court give this matter as rapid consideration as possible.

By their attorneys,  
**FRANCIS X. BELLOTTI**  
**ATTORNEY GENERAL**

**Garrick F. Cole**  
**Thomas R. Kiley**  
**Michael B. Meyer**  
**Assistant Attorneys General**  
**Government Bureau**

Department of the Attorney  
General  
One Ashburton Place  
Boston, Massachusetts 02108  
727-1004

DATED: August 1, 1977

August 1, 1977

Dear

I am writing to request your participation in a survey which the Attorney General is conducting in relation to a pending civil action in the United States District Court for the District of Massachusetts. The name of the case is William Baird, et al. v. Francis X. Bellotti, et al., Civil Action No. 74-4992-F, and the major issue involved is the constitutionality of Mass. Gen. Laws Ann. ch. 112, § 12P (West Supp. 1977).

This survey seeks to determine the practice of selected health care facilities in the Commonwealth regarding requirements of parental consent for health care services delivered to minors (persons under eighteen years of age). While the Attorney General is aware of the general legal standards applicable to this area of hospital procedure, he believes that proper decision in the pending litigation requires more detailed knowledge of actual practice. It is this purpose, and no other, which this survey is designed to serve.

I have enclosed with this letter a survey questionnaire which I would appreciate your completing and returning to me, along with the requested documentary attachments, in the enclosed pre-addressed, pre-stamped envelope by August 15, 1977. The questionnaire generally requires yes or no or check mark answers. A few

questions require a written response, and I would appreciate your taking sufficient time to answer them in some detail. An instruction sheet is attached to the questionnaire, but, should you have a question which it does not answer, please feel free to call Lawrence Gottlieb, the member of our staff primarily responsible for the survey, at 617-727-1017.

Our intention is to preserve the confidentiality of the responses to this survey.

The Attorney General appreciates your willingness to assist the Commonwealth in this matter.

Sincerely yours,

Garrick F. Cole  
Assistant Attorney  
General

Enclosures

[Title omitted in printing]

PARENTAL CONSENT  
REQUIREMENTS SURVEY

Instructions

1. Please be sure your answers are as accurate and complete as possible.
2. Please feel free to insert notations or comments wherever you feel they are appropriate.
3. Please mark any questions or portions of questions which are not applicable to your institution with the letters "NA".
4. You may, if you wish, attach additional sheets to this survey if you need more space to answer the questions completely.
5. This survey is not concerned with consent requirements for emergency procedures unless otherwise indicated.

6. Please attach to the end of the questionare copies of all consent forms used at your institution along with any administrative directives or instructions concerning consent procedures.

[Title omitted in printing]

PARENTAL CONSENT  
REQUIREMENTS SURVEY

Questionnaire

1. Are there any parental consent requirements for the care of minors in effect at your institution?

ANSWER: Yes [ ] (1)

No [ ] (2)

2. At what age can a person give his or her own consent for all procuedures done at your institution?

ANSWER: \_\_\_\_\_ (3)

3. What are the parental consent requirements at your institution for the performance of the following procedures on persons under the age stated in your answer to No. 22?

Procedure	No Parental Consent Required	One Parent's Consent Required	Both Parents' Consent Required
Counselling and/or Psychiatric evaluation	<input type="checkbox"/> (4)	<input type="checkbox"/> (5)	<input type="checkbox"/> (6)
Physical Examination	<input type="checkbox"/> (7)	<input type="checkbox"/> (8)	<input type="checkbox"/> (9)
Pelvic Examination	<input type="checkbox"/> (10)	<input type="checkbox"/> (11)	<input type="checkbox"/> (12)
Prescription of Non-Psychotropic drugs	<input type="checkbox"/> (13)	<input type="checkbox"/> (14)	<input type="checkbox"/> (15)
Prescription of Birth Control drugs or devices	<input type="checkbox"/> (16)	<input type="checkbox"/> (17)	<input type="checkbox"/> (18)
Prescription of Psychotropic drugs	<input type="checkbox"/> (19)	<input type="checkbox"/> (20)	<input type="checkbox"/> (21)
Venipuncture	<input type="checkbox"/> (22)	<input type="checkbox"/> (23)	<input type="checkbox"/> (24)
Blood Donation	<input type="checkbox"/> (25)	<input type="checkbox"/> (26)	<input type="checkbox"/> (27)
Methadone maintenance	<input type="checkbox"/> (28)	<input type="checkbox"/> (29)	<input type="checkbox"/> (30)
Hospitalization	<input type="checkbox"/> (31)	<input type="checkbox"/> (32)	<input type="checkbox"/> (33)
Blood transfusion	<input type="checkbox"/> (34)	<input type="checkbox"/> (35)	<input type="checkbox"/> (36)
Liver biopsy, angiography, Or similar invasive diagnostic procedure	<input type="checkbox"/> (37)	<input type="checkbox"/> (38)	<input type="checkbox"/> (39)
Tonsillectomy or other Minor surgery	<input type="checkbox"/> (40)	<input type="checkbox"/> (41)	<input type="checkbox"/> (42)
Rhinoplasty or other elective cosmetic surgery	<input type="checkbox"/> (43)	<input type="checkbox"/> (44)	<input type="checkbox"/> (45)
Kidney donation or Transplant	<input type="checkbox"/> (46)	<input type="checkbox"/> (47)	<input type="checkbox"/> (48)
Amputation or other Disfiguring procedures	<input type="checkbox"/> (49)	<input type="checkbox"/> (50)	<input type="checkbox"/> (51)
Brain, heart, or other Major surgery	<input type="checkbox"/> (52)	<input type="checkbox"/> (53)	<input type="checkbox"/> (54)
Voluntary psychiatric Commitment	<input type="checkbox"/> (55)	<input type="checkbox"/> (56)	<input type="checkbox"/> (57)

4. Please list any procedures for which you require the consent of both parents before the procedure may be done on a person under the age stated in your answer to No. 2.

5. What, if any, are the parental consent requirements at your institution for the performance of an abortion on a female adolescent under the age stated in your answer to No. 2?

6. What, if any, are the parental consent requirements at your institution for the sterilization of a person under the age stated in your answer to No. 2?

7. What, if any, are the exceptions to the general consent requirements at your institution with regard to emergency situations or other situations in which minors may consent to their own medical care?

8. What is the procedure at your institution for the care of minors in a non-emergency situation if the parents are not available?

9. What is the procedure at your institution for the care of minors in a non-emergency situation if the parents refuse consent?

10. What is the procedure at your institution for the non-emergency care of minors if the parents disagree among themselves as to whether to consent to a particular procedure for their minor child?

11. Please comment on the reasoning behind the parental consent requirements at your institution. Specifically, we are interested in why the requirements may differ for different procedures, why the consent of both parents may be required for some procedures, while only one parent's consent or no consent from parents may be required for other procedures, and what the reasoning is behind the consent requirements for abortions and sterilization for minors.

Please complete the information requested below, attach all consent forms, informed consent instructions, and similar documents to this page and return the questionnaire in the attached envelope to:

Garrick F. Cole  
Assistant Attorney General  
One Ashburton Place,  
20th Floor  
Boston, Massachusetts 02108

Name of Institution:

Address:

Chief Administrative Officer:

This Survey was  
Completed by:

---

Signature

Dated:

[Title omitted in printing]

ORDER

Defendants have moved for an order granting them leave to contact members of the plaintiff class for the purpose of requesting their participation in a survey concerning parental consent to medical and hospital procedures. The purpose of the survey is described in a letter attached and marked "A". The survey instrument defendants request permission to use is attached to this order and marked "B".

After consideration of defendants' motion, the Court ORDERS that:

defendants are permitted to contact members of the plaintiff class directly through the use of the letter and survey instrument attached to this order and to make whatever follow-up contacts may be necessary, either by telephone or

in person, to secure participation  
in the survey and completion of  
the survey instrument.

By the Court,

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Dated: August , 1977

[Title omitted in printing]

[ORDER DENYING]  
DEFENDANTS' MOTION FOR LEAVE  
TO CONTACT MEMBERS OF  
PLAINTIFF CLASS

Defendants move that the Court issue an order in the form attached permitting them to contact members of the plaintiff class by means of the letter attached to this motion as an exhibit and marked "A" for the purpose of requesting their participation in the survey described in the letter and to be conducted through use of the instrument attached to this motion as an exhibit and marked "B". In support of their motion, defendants point out that the Code of Professional Responsibility, DR 7-104(A)(1) and EC 7-18, prohibit defendants' counsel from communicating with members of the class represented by counsel, and

defendants assume that named plaintiffs' counsel represent absent members of the class within the meaning of the Code's prohibitions. See generally 3B J. Moore, Federal Practice, ¶ 23.75 (2 ed. 1977).

\* \* \* \* \*

8/2/77

Denied.

Freedman, J. (after conferring with Julian, J.).

(Title omitted in printing)

TO: Garrick F. Cole,  
Assistant Attorney General  
One Ashburton Place  
Boston, Massachusetts

Brian A. Riley, Esq.  
40 Court Street  
Boston, Massachusetts

Plaintiffs request the defendants and the defendant-intervenors within thirty (30) days after service of this request to admit, or in such shorter time as the Court may allow, for purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial the truth of the

following facts, or that the application of law to fact are true, or that the documents attached hereto are genuine:

1. A substantial number of females under the age of 18 are capable of forming a valid consent to an abortion procedure.

Source: Baird v. Bellotti, 393 F. Supp. 847, 855 (1975)

2. Informed consent is the giving of information to the patient as to just what would be done and its consequences.

Source: Planned Parenthood of Central Missouri v. Danforth, \_\_\_\_ U.S. \_\_\_\_, 96 S. Ct. 2831, 2840, ft. 8 (1976)

3. There are a very low percentage of complications or morbidity in the first trimester in the case of lawful as distinguished from illicitly performed abortions.

Source: Baird v. Bellotti, 393 F. Supp. 847, 853 (1975)

4. Delaying the abortion decision or its effectuation can cause psychological and medical problems, especially as the minor approaches the end of the first trimester.

Source: Baird v. Bellotti, 393 F. Supp. 847, 853 (1975)

5. There are no greater medical risks in the performance of abortion procedures upon minors than upon adults.

Source: Baird v. Bellotti, 393 F.  
Supp. 847, 853 (1975)

6. Parental support is desirable when an unmarried minor is pregnant.

Source: Baird v. Bellotti, 393 F.  
Supp. 847, 853 (1975)

7. An appreciable number of parents are not supportive when they discover or are informed that their unmarried daughter is pregnant.

Source: Baird v. Bellotti, 393 F.  
Supp. 847, 853 (1975)

8. Some minors correctly fear that physical harm would come to them if one or both of their parents knew that they were pregnant.

Source: Baird v. Bellotti, 393 F.  
Supp. 847, 853 (1975)

9. Some parents of pregnant minors would under no circumstances consent to an abortion for their daughters.

Source: Baird v. Bellotti, 393 F.  
Supp. 847, 853 (1975)

10. Some parents would attempt to make their pregnant minor daughters enter into marriages the daughters do not want.

Source: Baird v. Bellotti, 393 F.  
Supp. 847, 853 (1975)

11. Some minors do not want to inform their parents of their pregnancies because they do not want to cause their parents distress.

Source: Baird v. Bellotti, 393 F.  
Supp. 847, 853 (1975)

12. Some parents would insist that their pregnant minors continue their pregnancies as a punishment or to teach them a lesson.

Source: Baird v. Bellotti, 393 F. Supp. 847, 854 (1975)

13. The incidence of sexual activity among minors is high and the consequences of such activity are frequently devastating.

Source: Carey v. Population Services International, \_\_\_\_ U.S. \_\_\_\_, 97 S. Ct. 2010, 2022 (1977)

14. Teenage motherhood involves a host of problems, including adverse physical and psychological effects upon the minor and her baby, the continuous stigma associated with unwed motherhood, the need to drop out

of school with the accompanying impairment of educational opportunities and other dislocations including forced marriage of immature couples and often acute anxieties involved in deciding whether to secure an abortion.

Source: Carey v. Population Services International, \_\_\_\_ U.S. \_\_\_\_, 97 S. Ct. 2010, 2022 (1977)

15. Abortion in early pregnancy, that is, prior to the end of the first trimester, although not without its risk, is now relatively safe. Mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low or lower than the rates for normal childbirth.

Source: Roe v. Wade, 410 U.S. 113, 150 (1973)

16. Morality rates for women are high when abortions are performed illegally.

Source: Roe v. Wade, 410 U.S. 113, 151 (1973)

17. Time, of course, is critical in abortion. Risks during the first trimester of pregnancy are admittedly lower than during later months.

Source: Doe v. Bolton, 410 U.S. 179, 198 (1972)

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Joan C. Schmidt  
Law Offices of  
Joseph J. Balliro  
1 Center Plaza  
Boston, MA 02108  
227-5822  
723-1980

[Title omitted in printing]

ANSWERS OF THE PLAINTIFF  
GERALD ZUPNICK TO DEFENDANTS'  
REQUEST FOR ADMISSIONS OF FACT

Plaintiff Gerald Zupnick answers defendants' request for admissions of fact as follows: (Because of the length of each request for admissions, plaintiffs have omitted the actual request and have set forth only the response.)

1. Dr. Zupnick admits the truth of the matters set forth in this request.

2. Dr. Zupnick admits the truth of the matters set forth in this request.

3. (a) through (h) Dr. Zupnick admits the truth of the matters set forth in this request.

4. Dr. Zupnick admits the truth of the matters set forth in this request.

5. Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for the reasons that he is unable to derive the data set forth in this request from the stated sources.

6. Dr. Zupnick denies the truth of the matters set forth in this request for reasons that he has some knowledge regarding the subject matter of this request.

7. Dr. Zupnick denies the truth of the matters set forth in this request for reasons that he has some knowledge regarding the subject matter of this request.

8. (a) Dr. Zupnick admits the truth of the figures 153,484; 1,670; and 38,345, but denies the truth of the percentages 1.08% and 24.98%.

(b) Dr. Zupnick admits that 704 abortions were

performed but denies the truth of the percentage 0.46%.

(c) Dr. Zupnick admits the truth of the matters set forth in (c).

9. Dr. Zupnick denies the truth of the matters set forth in this request.

10. Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he believes that the ability to give an informed consent to a given medical or surgical procedure is a function of the complexity of that procedure, the medical and psychological impacts of that procedure and of the ability of the individual to comprehend these factors and, further, that the ability to give an informed consent is not a direct function of chronological age.

11. Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he

believes that the ability to give an informed consent to a given medical or surgical procedure is a function of the complexity of that procedure, the medical and psychological impacts of that procedure and of the ability of the individual to comprehend these factors and, further, that the ability to give an informed consent is not a direct function of chronological age.

12. Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he believes that the ability to give an informed consent to a given medical or surgical procedure is a function of the complexity of that procedure, the medical and psychological impacts of that procedure and of the ability of the individual to comprehend these factors and, further, that the ability to give an informed consent is not a direct function of chronological age.

13. Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he believes that the ability to give an informed consent to a given medical or surgical procedure is a function of the complexity of that procedure, the medical and psychological impacts of that procedure and of the ability of the individual to comprehend these factors and, further, that the ability to give an informed consent is not a direct function of chronological age.

14. Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he believes that the ability to give an informed consent to a given medical or surgical procedure is a function of the complexity of that procedure, the medical and psychological impacts of that procedure and of the ability of the individual to comprehend these factors and, further, that the ability

to give an informed consent is not a direct function of chronological age.

15. Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he believes that the ability to give an informed consent to a given medical or surgical procedure is a function of the complexity of that procedure, the medical and psychological impacts of that procedure and of the ability of the individual to comprehend these factors and, further, that the ability to give an informed consent is not a direct function of chronological age.

16. Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he believes that the ability to give an informed consent to a given medical or surgical procedure is a function of the complexity of that procedure, the medical and psychological impacts of that procedure and of the ability of

the individual to comprehend these factors and, further, that the ability to give an informed consent is not a direct function of chronological age.

17. Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he believes that the ability to give an informed consent to a given medical or surgical procedure is a function of the complexity of that procedure, the medical and psychological impacts of that procedure and of the ability of the individual to comprehend these factors and, further, that the ability to give an informed consent is not a direct function of chronological age.

18. Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he believes that the ability to give an informed consent to a given medical or surgical procedure is a function of the complexity of that procedure, the

medical and psychological impacts of that procedure and of the ability of the individual to comprehend these factors and, further, that the ability to give an informed consent is not a direct function of chronological age.

19. Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he believes that the ability to give an informed consent to a given medical or surgical procedure is a function of the complexity of that procedure, the medical and psychological impacts of that procedure and of the ability of the individual to comprehend these factors and, further, that the ability to give an informed consent is not a direct function of chronological age.

20. Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he believes that the ability to give an informed consent to a given medical or

surgical procedure is a function of the complexity of that procedure, the medical and psychological impacts of that procedure and of the ability of the individual to comprehend these factors and, further, that the ability to give an informed consent is not a direct function of chronological age.

21. Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he believes that the ability to give an informed consent to a given medical or surgical procedure is a function of the complexity of that procedure, the medical and psychological impacts of that procedure and of the ability of the individual to comprehend these factors and, further, that the ability to give an informed consent is not a direct function of chronological age.

22. Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he

believes that the ability to give an informed consent to a given medical or surgical procedure is a function of the complexity of that procedure, the medical and psychological impacts of that procedure and of the ability of the individual to comprehend these factors and, further, that the ability to give an informed consent is not a direct function of chronological age.

23. Dr. Zupnick denies the truth of the matters set forth in this request.

24. Dr. Zupnick denies the truth of the matters set forth in this request.

25. Dr. Zupnick denies the truth of the matters set forth in this request.

26. Dr. Zupnick denies the truth of the matters set forth in this request.

27. Dr. Zupnick denies the truth of the matters set forth in this request.

28. Dr. Zupnick denies the truth of the matters set forth in this request.

29. Dr. Zupnick denies the truth of the matters set forth in this request.

30. Dr. Zupnick denies the truth of the matters set forth in this request.

31. Dr. Zupnick denies the truth of the matters set forth in this request.

32. Dr. Zupnick denies the truth of the matters set forth in this request.

33. Dr. Zupnick denies the truth of the matters set forth in this request.

34. Dr. Zupnick denies the truth of the matters set forth in this request.

35. Dr. Zupnick denies the truth of the matters set forth in this request.

36. (a) Dr. Zupnick admits the truth of the matters set forth in this request.  
(b) Dr. Zupnick admits the truth of the matters set forth in this request.  
(c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of whether or not the factual statements are correct.
- 36A. (a) Dr. Zupnick admits the truth of the matters set forth in this request.  
(b) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he is unfamiliar with the journal cited.
- (c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of whether or not the factual statements are correct.  
(d) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of whether or not the factual statements are correct.
- 36B. (a) Dr. Zupnick admits the truth of the matters set forth in this request.  
(b) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he is unfamiliar with the journal cited.

- (c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of whether or not the factual statements are correct.
- (d) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of these matters.
- 36C. (a) Dr. Zupnick admits the truth of the matters set forth in this request.
- (b) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he is unfamiliar with the journal cited.
- (c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of whether or not the factual statements are correct.
- (d) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of these matters.
- 36D. (a) Dr. Zupnick admits the truth of the matters set forth in this request.
- (b) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he is unfamiliar with the journal cited.

- (c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of whether or not the factual statements are correct.
- (d) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of these matters.
37. (a) Dr. Zupnick admits the truth of the matters set forth in this request.
- (b) Dr. Zupnick admits the truth of the matters set forth in this request.
- (c) Dr. Zupnick admits the truth of the matters set forth in this request.
38. (a) Dr. Zupnick admits the truth of the matters set forth in this request.
- (b) Dr. Zupnick admits the truth of the matters set forth in this request.
- (c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of whether or not the factual statements are correct.
39. (a) Dr. Zupnick admits the truth of the matters set forth in this request.
- (b) Dr. Zupnick admits the truth of the matters set forth in this request.
- (c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason

- that he has no personal knowledge of whether or not the factual statements are correct.
40. (a) Dr. Zupnick admits the truth of the matters set forth in this request.  
(b) Dr. Zupnick admits the truth of the matters set forth in this request.  
(c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of whether or not the factual statements are correct.
41. (a) Dr. Zupnick admits the truth of the matters set forth in this request.  
(b) Dr. Zupnick admits the truth of the matters set forth in this request.
- (c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of whether or not the factual statements are correct.
42. (a) Dr. Zupnick admits the truth of the matters set forth in this request  
(a).  
(b) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he is unfamiliar with the journal cited.  
(c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of whether or not the factual statements are correct.

knowledge of whether or  
not the factual  
statements are correct.

43. Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that the time period involved is not specifically set forth.

44. Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no knowledge of the facts alleged therein. Dr. Zupnick objects to this request on the ground that the admission sought is irrelevant to the subject matter of this action.

45. Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request. Dr. Zupnick objects to this request on the ground that the admission sought is irrelevant to the subject matter of this action.

46. (a) Dr. Zupnick admits the truth of the matters set forth in this request.

(b) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he is unfamiliar with the journal cited.

(c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of whether or not the factual statements are correct.

47. (a) Dr. Zupnick admits the truth of the matters set forth in this request.

(b) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he is unfamiliar with the journal cited.

- (c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of whether or not the factual statements are correct.
48. (a) Dr. Zupnick admits the truth of the matters set forth in this request.
- (b) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he is unfamiliar with the journal cited.
- (c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of whether or not the factual statements are correct.
- (d) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of these matters.
49. Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request.
50. (a) Dr. Zupnick admits the truth of the matters set forth in this request.
- (b) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he is unfamiliar with the journal cited.
- (c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason

- that he has no personal knowledge of whether or not the factual statements are correct.
- (d) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of these matters.
51. (a) Dr. Zupnick admits the truth of the matters set forth in this request.
- (b) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he is unfamiliar with the journal cited.
- (c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason
- that he has no personal knowledge of whether or not the factual statements are correct.
- (d) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of these matters.
52. (a) Dr. Zupnick admits the truth of the matters set forth in this request.
- (b) Dr. Zupnick admits the truth of the matters set forth in this request.
- (c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of whether or not the factual statements are correct.

- (d) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of these matters.
53. (a) Dr. Zupnick admits the truth of the matters set forth in this request.
- (b) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he is unfamiliar with the journal cited.
- (c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of whether or not the factual statements are correct.
- (d) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of these matters.
54. (a) Dr. Zupnick admits the truth of the matters set forth in this request.
- (b) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he is unfamiliar with the journal cited.
- (c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of whether or not the factual statements are correct.

- (d) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of these matters.
55. (a) Dr. Zupnick admits the truth of the matters set forth in this request.  
(b) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he is unfamiliar with the journal cited.  
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- (d) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of these matters.
56. (a) Dr. Zupnick admits the truth of the matters set forth in this request.  
(b) Dr. Zupnick admits the truth of the matters set forth in this request.  
(c) Dr. Zupnick admits the truth of the matters set forth in this request.  
(d) Dr. Zupnick admits the truth of the matters set forth in this request.
57. (a) Dr. Zupnick admits the truth of the matters set forth in this request.  
(b) Dr. Zupnick admits the truth of the matters set forth in this request.

- (c) Dr. Zupnick admits the truth of the matters set forth in this request.
- (d) Dr. Zupnick admits the truth of the matters set forth in this request.
58. (a) Dr. Zupnick admits the truth of the matters set forth in this request.
- (b) Dr. Zupnick admits the truth of the matters set forth in this request.
- (c) Dr. Zupnick admits the truth of the matters set forth in this request.
- (d) Dr. Zupnick admits the truth of the matters set forth in this request.
59. (a) Dr. Zupnick admits the truth of the matters set forth in this request.
- (b) Dr. Zupnick admits the truth of the matters set forth in this request.
- (c) Dr. Zupnick admits the truth of the matters set forth in this request.
- (d) Dr. Zupnick admits the truth of the matters set forth in this request.
60. (a) Dr. Zupnick admits the truth of the matters set forth in this request.
- (b) Dr. Zupnick admits the truth of the matters set forth in this request.
- (c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of whether or not the factual statements are correct.
- (d) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason

- that he has no personal knowledge of these matters.
61. (a) Dr. Zupnick admits the truth of the matters set forth in this request.  
(b) Dr. Zupnick admits the truth of the matters set forth in this request.  
(c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of whether or not the factual statements are correct.  
(d) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of these matters.
62. (a) Dr. Zupnick admits the truth of the matters set forth in this request.  
(b) Dr. Zupnick admits the truth of the matters set forth in this request.  
(c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of whether or not the factual statements are correct.  
(d) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of these matters.
63. (a) Dr. Zupnick admits the truth of the matters set forth in this request.

- (b) Dr. Zupnick admits the truth of the matters set forth in this request.
- (c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of whether or not the factual statements are correct.
- (d) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of these matters.
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- (b) Dr. Zupnick admits the truth of the matters set forth in this request.
- (c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of whether or not the factual statements are correct.
- (d) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of these matters.
65. (a) Dr. Zupnick admits the truth of the matters set forth in this request.
- (b) Dr. Zupnick admits the truth of the matters set forth in this request.
- (c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of whether or not the factual statements are correct.

- this request for reason that he has no personal knowledge of whether or not the factual statements are correct.
- (d) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of these matters.
66. (a) Dr. Zupnick admits the truth of the matters set forth in this request.
- (b) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he is unfamiliar with the journal cited.
- (c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in
- this request for reason that he has no personal knowledge of whether or not the factual statements are correct.
- (d) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of these matters.
67. (a) Dr. Zupnick admits the truth of the matters set forth in this request.
- (b) Dr. Zupnick admits the truth of the matters set forth in this request.
- (c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal

- knowledge of whether or  
not the factual  
statements are correct.
- (d) Dr. Zupnick cannot  
truthfully admit or deny  
the matters set forth in  
this request for reason  
that he has no personal  
knowledge of these  
matters.
68. (a) Dr. Zupnick admits the  
truth of the matters set  
forth in this request.  
  
(b) Dr. Zupnick cannot  
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that he is unfamiliar  
with the journal cited.  
  
(c) Dr. Zupnick cannot  
truthfully admit or deny  
the matters set forth in  
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that he has no personal
- knowledge of whether or  
not the factual  
statements are correct.
- (d) Dr. Zupnick cannot  
truthfully admit or deny  
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this request for reason  
that he has no personal  
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matters.
69. (a) Dr. Zupnick admits the  
truth of the matters set  
forth in this request.  
  
(b) Dr. Zupnick admits the  
truth of the matters set  
forth in this request.  
  
(c) Dr. Zupnick cannot  
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this request for reason  
that he has no personal  
knowledge of whether or  
not the factual  
statements are correct.

- (d) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of these matters.
70. (a) Dr. Zupnick admits the truth of the matters set forth in this request.  
(b) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he is unfamiliar with the journal cited.  
(c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of whether or not the factual statements are correct.
- (d) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of these matters.
71. (a) Dr. Zupnick admits the truth of the matters set forth in this request.  
(b) Dr. Zupnick admits the truth of the matters set forth in this request.  
(c) Dr. Zupnick admits the truth of the matters set forth in this request.  
(d) Dr. Zupnick admits the truth of the matters set forth in this request.
72. (a) Dr. Zupnick admits the truth of the matters set forth in this request.  
(b) Dr. Zupnick admits the truth of the matters set forth in this request.

- (c) Dr. Zupnick admits the truth of the matters set forth in this request.
- (d) Dr. Zupnick admits the truth of the matters set forth in this request.
73. (a) Dr. Zupnick admits the truth of the matters set forth in this request.
- (b) Dr. Zupnick admits the truth of the matters set forth in this request.
- (c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of whether or not the factual statements are correct.
- (d) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason
- that he has no personal knowledge of these matters.
74. (a) Dr. Zupnick admits the truth of the matters set forth in this request.
- (b) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he is unfamiliar with the journal cited.
- (c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of whether or not the factual statements are correct.
- (d) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason

that he has no personal knowledge of these matters.

75. (a) Dr. Zupnick admits the truth of the matters set forth in this request.
- (b) Dr. Zupnick admits the truth of the matters set forth in this request.
- (c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of whether or not the factual statements are correct.
- (d) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of these matters.

76. (a) Dr. Zupnick admits the truth of the matters set forth in this request.

- (b) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he is unfamiliar with the journal cited.
- (c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of whether or not the factual statements are correct.
- (d) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of these matters.

77. (a) Dr. Zupnick admits the truth of the matters set forth in this request.
- (b) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he is unfamiliar with the journal cited.
- (c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of whether or not the factual statements are correct.
- (d) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of these matters.

78. (a) Dr. Zupnick admits the truth of the matters set forth in this request.
- (b) Dr. Zupnick admits the truth of the matters set forth in this request.
- (c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of whether or not the factual statements are correct.
- (d) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of these matters.
79. (a) Dr. Zupnick admits the truth of the matters set forth in this request.

- (b) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he is unfamiliar with the journal cited.
- (c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of whether or not the factual statements are correct.
- (d) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of these matters.
80. (a) Dr. Zupnick admits the truth of the matters set forth in this request.
- (b) Dr. Zupnick admits the truth of the matters set forth in this request.
- (c) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of whether or not the factual statements are correct.
- (d) Dr. Zupnick cannot truthfully admit or deny the matters set forth in this request for reason that he has no personal knowledge of these matters.
- 
- Joan C. Schmidt, Esquire  
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- DATED: August 17, 1977

[Title omitted in printing]

Plaintiffs' Response to Defendants'  
Motion to Determine the Sufficiency  
of Plaintiffs' Responses to Defendants'  
First Set of Requests for Admissions  
by Plaintiff Gerald Zupnick

The defendants served their Request for Admissions upon plaintiffs' counsel on August 2, 1977. In order that answers might be filed prior to the pre-trial conference, the Court ordered that the plaintiffs make their response to these requests by August 18, 1977.

This Request for Admissions consisted of over eighty (80) numbered requests, most with sub-requests, for a total of over two hundred (200) separate requests. The bulk of the requests consisted of excerpts, portions of medical texts or

journals. Some of these excerpts were statistical tables, while others consisted of parts of articles of varying lengths. The bulk of the requests gave either an excerpt or statistical tables, their sources, and then required that Dr. Zupnick respond to the following:

- "a. the quoted material actually appears in the cited journal as it is reproduced here;
- b. the journal in which the quoted material appears is a reliable medical or scientific authority;
- c. the quoted material's factual statements are correct;
- d. the quoted material's statements of expert judgment and opinion are statements which reputable and competent experts in the field have made after careful professional judgments and opinions."

Dr. Zupnick uniformly admitted sub-request (a). In those instances where Dr. Zupnick knew that the cited authority was of a sufficiently high caliber, he admitted to sub-request (b). In instances where Dr. Zupnick had not heard of the cited journal, he answered that he could not truthfully admit or deny them.

Defendants allege that his answers were erroneous as a matter of law, that plaintiffs had a duty to secure information to answer the requests, and that plaintiffs' answers were made in bad faith. Plaintiffs contest all these allegations for the reasons set forth below.

#### I. Lack of Personal Knowledge Where the Knowledge is Not Readily Attainable is a Sufficient Answer to a Request for Admissions.

Defendants cited to this Court the case of Lumpkin v. Meskill, 64 F.R.D. 673 (D. Conn. 1974) for the proposition that responses of "lack of personal knowledge" or "independent advice must be sought" are not proper answers to a request for admissions. Defendants go on to state that Lumpkin presents a mirror image of the problem now before this Court.

While plaintiffs agree that this case is strikingly similar to our own, we respectfully disagree with defendants' interpretation. In Lumpkin, the plaintiffs brought a desegregation action against the local school board and state officials. As a part of their case, plaintiffs compiled statistical tables concerning

racial distributions in the school district, and asked the defendant State to admit the validity of the statistics. The Answer of the State, that it could neither admit nor deny the validity of the study for lack of personal knowledge, was held to be deficient since the Court found that through reasonable inquiry the information necessary to form an opinion as to the validity of the statistics could be secured.

The Court founded its decision on the following factors:

1. That the researcher who compiled the data was offered for deposition by the plaintiffs;
2. That the defendant could inspect the field notes and working papers of the researcher; Id. at 679.

Also relevant to that Court's determination would be the fact that the defendants could have conducted their own survey of their own school

district or at least made a random check to determine the accuracy of plaintiff's findings. The Court concluded that "the defendant is only being asked to secure such knowledge and information as are readily obtainable by it. Id. at 679.

The key to the Lumpkin decision is that the means of verifying the accuracy of the statistics was "readily available" to the defendants. In the instant matter, plaintiffs contend that not only is the information which would be required to fully respond to defendants' requests not "readily available," but it is almost impossible to secure, especially in the short time period allocated.

Defendants' requests contain over thirty (30) different sources of data and excerpts from medical journals and texts. None of the studies (with the

exception of those done by Dr. Nadelson, all of which were admitted) was done by either the plaintiffs or the defendants or anyone in their employ, as was the situation in Lumpkin.

Furthermore, in Lumpkin, the plaintiffs made their researcher available for deposition, and also offered his field notes and working papers to the defendants. Except for the source materials utilized in two requests, the Attorney General has steadfastly refused to provide the plaintiffs with even so much as copies of the documents from which the excerpts and tables were drawn. Plaintiffs have no possible way of verifying the data utilized and the quality of the research studies cited. In Lumpkin, only one study was involved; here there are thirty (30) or more. In Lumpkin, the researcher and his materials were available.

Here, even if plaintiffs attempted to do so, they could not possibly conduct any kind of investigation of these materials given the short time allowed, and given that the bulk of the research was done outside the Commonwealth, and that some of it was done outside the United States. Certainly, the means of forming a solid opinion concerning these thirty studies is not "readily available" to plaintiffs.

Plaintiffs further contend that defendants' requests would obligate the plaintiffs to conduct extensive studies regarding the opinions held by various medical doctors and other scientific experts. The defendants asked Dr. Zupnick to admit whether certain documents were from reliable medical or scientific authorities. Given the vast number of medical and scientific publications, it is natural that Dr. Zupnick (or any doctor) could

not be expected to be familiar with all of them. Other than taking his own scientific survey, there is no other means for him to determine whether, for example, "The Medical Journal of Australia" or the "American Journal of Orthopsychiatry" is considered reliable by his colleagues. Likewise, to determine whether or not a given study represents the work of careful, professional investigation and whether or not the researchers' conclusions or opinions represent generally accepted professional judgments and opinions would be a monumental task. Surely, this result was not contemplated by the framers of Rule 36.

II. Defendants Should be Estopped From Denying the Validity of the Study Entitled "11 MILLION TEENAGERS" or From Going Forward with Their Motion to Determine the Sufficiency of Plaintiffs' Responses to Defendants' First Set of Requests for Admissions.

Plaintiffs would like to offer the study entitled "11 Million Teenagers" into evidence at the trial of this case. "11 Million Teenagers" was prepared by researchers affiliated with the Alan Guttmacher Institute of New York. This study is a compilation of the best research studies available today concerning teenage sexuality and pregnancy and is an attempt to organize all these diverse studies under one cover. Plaintiffs anticipate that this study would provide helpful background material to

this Court and, ultimately, to the United States Supreme Court. Much of the data contained in "11 Million Teenagers" was obtained from the Bureau of the Census, the Department of Health, Education and Welfare, the United Nations and other very reputable sources.

Defendants contend that they cannot stipulate to the admission into evidence of "11 Million Teenagers" because the "document is inadmissible for several reasons, including its irrelevancy, its lack of guarantees of trustworthiness and the fact that it contains statements that are hearsay and hearsay upon hearsay."

Defendants' Memorandum of Law for Pre-Trial Conference, August 19, 1977, page 22.

What is surprising about defendants' hostility to the admission of "11 Million Teenagers" is that the defendants themselves have included

one request for admission with eight (8) separate sub-requests which are extracts from this same study. See Defendants' First Set of Requests for Admissions to Plaintiff Gerald Zupnick; August 1, 1977; request number 3a-h, pages 3 and 4.

Defendants further have stated in their Memorandum in Support of Their Motion to Determine the Sufficiency of Plaintiffs' Responses, August 22, 1977, page 6, that their ". . . requests are comprised in large parts of extracts from known and respected medical texts and periodicals . . ." To the Attorney General, on one occasion, "11 Million Teenagers" is respectable enough to form the basis of a request to admit directed to the plaintiffs, and, on another occasion, it is classified by the defendants as an inaccurate and incompetent work.

Plaintiffs contend that the defendants should be forced to assume a consistent posture with regard to "11 Million Teenagers." If the study is a worthy subject of a request for admissions and excerpts of it are admitted into evidence via the vehicle of requests for admissions, then the defendants should be estopped from asserting the inadmissibility of the study. On the other hand, if defendants persist in their assertions that "11 Million Teenagers" is an unreliable work, then it should be assumed that the other excerpts which are the subject matter of defendant's requests for admissions are also equally incompetent. Therefore, the defendants should be required to prove by testimonial evidence the validity of each study cited in the same way plaintiffs are now obliged to prove the validity of "11 Million Teenagers."

### III. Plaintiffs Have Responded to Defendants' Requests in Good Faith.

Defendants contend that plaintiff Zupnick's responses were not made in good faith for three reasons. The first reason, the personal knowledge issue, has been answered in Section 1 of this response. The second reason, that plaintiff Zupnick refused to admit requests that were founded upon well-known texts and periodicals, is met in Sections 1 and 2. Thirdly, Dr. Zupnick is considered by the defendants to have acted in bad faith since according to the Attorney General's Office Dr. Nadelson "had already admitted many of the requests to which Zupnick either objected to or denied."

Plaintiffs can readily answer this third allegation of so-called bad faith by pointing out that experts

often disagree and their disagreement is not any indication of bad faith or of lack of expertise in their fields. Further, Exhibit A to defendants' motion suggests that Dr. Nadelson "admitted essential truth" to some fifteen (15) requests that Dr. Zupnick could neither admit nor deny. Taking for example Numbers 52, 53 and 54 of defendants' Request for Admissions, all of which Dr. Nadelson has presumably admitted, plaintiffs suggest that her admissions of essential truth are not so clear and so unambiguous as defendants assert. Attached to this response as Exhibit A are Dr. Nadelson's responses at her deposition to the questions contained in these Requests. Over and over Dr. Nadelson's answers demonstrate that yes or no answers are incorrect and inappropriate, and that further clarification, additions and amendments were necessary.

Defendants also give as an example of Dr. Zupnick's alleged bad faith his denial of Request No. 35, which reads that, "(n)o female 5 years old is able to give legally effective consent to medical or surgical procedures."

In answer to several earlier requests, Dr. Zupnick stated that "he believes that the ability to give an informed consent to a given medical or surgical procedure is a function of the complexity of that procedure, the medical and psychological impacts of that procedure and of the ability of the individual to comprehend these factors, and further that the ability to give an informed consent is not a direct function of chronological age." Dr. Zupnick feels that to state that no female can give consent is very obviously incorrect for the reason that certain intellectually gifted children of 5 years can give consent to many procedures and that

the average 5 year old can give an informed consent to such simple emergency medical procedures as bandaging a cut or wound. Certainly for Dr. Zupnick to deny this request was entirely appropriate.

IV. Defendants' Requests for Admissions Are For the Most Part Not in Accord with the Requirements of Rule 36 of the Fed. R. Civ. P.

A. The majority of defendants Requests for Admissions should have been designated as requests to admit the genuineness of documents pursuant to Fed. R. Civ. P. 36 and copies of the entire documents should have been delivered to plaintiffs. Then, the documents in their entirety, if genuineness was admitted, could have gone into evidence.

Rule 36 provides a mechanism whereby documents can be admitted into evidence without the usual time-consuming procedure of having a live witness authenticate the document and explain its origins. Plaintiffs are decidedly uncomfortable with defendants' approach of excerpting parts of texts, and are of the opinion that a good study can speak for itself if presented in its entirety. Defendants' procedure of excerpting out portions of studies and articles leaves many questions unanswered, and could result in materials being quoted out of their proper context. Defendants' approach also leaves plaintiffs without the ability to introduce into evidence the remaining portions of these studies. Admissions stand alone and obviously cannot be cross-examined. Defendants should not be permitted to evade the clear intent of Rule 36 with respect to the treatment of documents.

Rule 36 further limits the scope of a request for admission with regard to documents to the genuineness of the particular document. Defendants' request that Dr. Zupnick admit facts and opinions contained in lengthy excerpts is another attempt to avoid the strictures of Rule 36. As stated by Professor Moore, "(t)he request for admission should be simple and direct and should seek admission of the genuineness of the document, not request an interpretation of its contents." 4A Moore's Federal Practice, 2nd Ed. 36.03(4) at 36-21. See also Jackson Buff Corp. v. Marcelle, 20 F.R.D. 139 (E.D.N.Y. 1957).

B. The majority of defendants' Requests for Admissions are improper in form and not in accordance with the requirements of Rule 36 of the Fed. R. Civ. P.

The rules concerning the form of requests for admissions are clear. Those rules were restated in Havenfield Corp. v. H & R Block, Inc., 67 F.R.D. 93 (W.D.Mo. 1973) at 96, where the Court held that:

"(r)egardless of the subject matter of the Rule 36 request, the statement of the fact itself should be in simple and concise terms in order that it can be denied or admitted with an absolute minimum of explanation or qualification. 4A Moore's Federal Practice, 2nd Ed. 36.05(a) at 35-36. The request 'except in a most unusual circumstance, should be such that it (can) be answered yes, no, the answerer does not know, or a very simple direct

explanation given as to why he cannot answer, such as in the case of privilege."

The Havenfield Court went on to find that defendant's requests were "couched in general, unequivocal terms which appear to facilitate unequivocal admissions or denials." Id. at 97.

A cursory perusal of defendants' requests reveals that almost none of the requests could possibly be answered simply and unequivocally. Request No. 36 and 36A each cover two standard-size pages, single spaced. For Dr. Zupnick to respond to each fact and each separate opinion contained in these two requests alone would practically require Dr. Zupnick to write a book on each of these two excerpted articles. Dr. Nadelson's answers at her deposition (see Exhibit A) also demonstrate that simple answers cannot be properly made to these Requests.

Defendants have stated that plaintiffs do not understand Rule 36. Perhaps that is so, but it is also very obvious that defendants' comprehension of Rule 36 is at least equally limited.

C. The majority of defendants' Requests for Admissions are irrelevant to the issues to be tried by this Court on October 17, 1977.

At the pre-trial conference on August 22, 1977, agreement as to the issues left to be tried was reached between all parties to this litigation. The bulk of defendants' Requests for Admissions are irrelevant to these issues and were the subject of the prior trial of this case. For example, requests Nos. 9 through 35 are concerned with the ability of minors to give informed consent to medical or surgical procedures. Detailed evidence was presented on

this issue by all the expert witnesses and this Court made findings based on that evidence. Baird v. Bellotti, 393 F. Supp. 847, 855 (1975).

Other requests seem to be plainly irrelevant to any possible issue in this litigation. For example, in Requests Nos. 44 through 47, reference is made to data, none of which was gathered after 1968, which was well before abortion became legalized in Massachusetts. Plaintiffs doubt that any increase in the number of adolescents who delivered at Boston City Hospital between 1953 and 1956 or like data could have any rational bearing on the issues of teenage abortion in 1977.

#### V. Conclusion

For the foregoing reasons, the defendants' Motion to Determine the Sufficiency of Plaintiffs' Answers should be denied. If in the

alternative, if the Court feels that as to certain of the request plaintiffs' answers were inappropriate, plaintiffs would request additional time and also some guidance as to the extent of Dr. Zupnick's duty in answering.

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September 1, 1977

A It may, but not necessarily, though.

Q Could that conflict be manifested in subsequent neurotic tendencies or reactions?

A Could be.

Q Would you agree that adolescents tend to show a special intensity and volatility of feeling and that certain of their emotions are extremely strong and extremely changeable?

A Yes, that is true, but I think it is important to differentiate that one has to be careful about what age adolescent one is talking about.

Q Would you agree with the following statement: Closely allied to his intensity of feeling is the adolescent's need for frequent and immediate gratification?

A I'd make two comments: One is to "his," mostly because the research is on "his" and not "her," so

that the nature of female adolescent processes is less well-known. On the other score, yes.

Q What does "reality testing" mean in psychiatry?

A It means the ability to perceive a situation and realistically assess what its implications are. Usually it is used more related to some psychoses than anything else.

Q Would you agree with the following statement: Reality testing is not as effective in the adolescent as in the adult? An adolescent is particularly likely to be unaware of the probable consequences of his actions and to understand the feelings or behavior of others?

A That is generally more true of adolescents than adults.

Q Would you agree with the following statement: If we examine the failures of reality testing, we find them to be limited to situations

in which the adolescent's relation to a parent or parent substitute is of primary importance?

A That would be hard to answer without knowing the context in which that statement was made.

Q Would you agree with the following statement: There is in adolescence a failure of self-criticism. This is perhaps only a special instance of the failure of reality testing. This quality is best described as an inability to take another person's point of view and to get off and look at oneself. It is one of the factors permitting the adolescents to behave and feel in an impulsive, immoderate and unrealistic way?

A Yes, that is generally true, but not always true.

Q Would you agree with the following statement: The adolescent

has an awareness of the world about him different from that of an adult?

A Unawareness or an awareness?

Q Let me start that over again. The adolescent has an awareness of the world about him different from that of the adult.

A Generally, yes.

Q Would you agree with the following statement: During adolescence the physiological and maturational changes which occur lead to extremely strong emotional reactions and the adolescent lacks experience with her feelings and does not have the emotional control of an adult?

A Again, generally, that is true, but not always, and also for younger adolescents than for older adolescents, as are all those statements.

Q Would you agree that as a general statement the following is

correct: What is specific of adolescence is the lessened amount of adaptive mechanism with which to deal with these problems -- referring to unwanted pregnancies or abortions?

A Could you restate that, please?

Q Certainly.

Would you agree that the following statement is generally correct: What is specific to this age group, referring to adolescence, is the lessened amount of adaptive mechanism with which to deal with these problems -- referring to unwanted pregnancies or abortions?

A There are two different problems there.

Q Would you agree with the first with respect to unwanted pregnancies?

A Yes.

Q Would you agree with the second with respect to the decision?

A It is not as clear.

Q Would you agree with the following statement: When we see an adolescent or young adult we are seeing an individual in painful and extended crisis. In the crisis of pregnancy, the potential for regression or maturation is particularly dramatic?

A That doesn't make sense.

Q Let's break it down.

A All right.

Q Would you agree with this part, first of all: When we see an adolescent or young adult we are seeing an individual in painful and extended crisis?

A All right.

Q You agree with that part?

A Yes.

Q The second part is: In the crisis of pregnancy the potential for regression or maturation is particularly dramatic.

[Title omitted in printing]

Defendant-Intervenor's Answer  
to Plaintiffs' First Request  
for Admissions

The defendant-intervenor answers plaintiffs' first request for admissions as follows:

1. QUESTION: A substantial number of females under the age of 18 are capable of forming a valid consent to an abortion procedure.

Source: Baird v. Bellotti, 393 F. Supp. 847, 855 (1975.)

ANSWER: Defendant-intervenor cannot admit or deny the matters set forth in this request for the reason that she has no personal knowledge of whether or not such facts are correct and further state that such matters are legislative facts if material.

2. QUESTION: Informed consent is the giving of information to the patient as to just what would be done and its consequences.

Source: Planned Parenthood of Central Missouri v. Danforth, \_\_\_\_ U.S. \_\_\_\_, 96 S. Ct. 2831, 2840, ft. 8 (1976)

ANSWER: The matters contained in this request are not appropriate for admission by any party because it concerns a question of law which as stated is incomplete and incorrect.

3. QUESTION: There are a very low percentage of complications or morbidity in the first trimester in the case of lawful as distinguished from illicitly performed abortions.

Source: Baird v. Bellotti, 393 F. Supp. 847, 853 (1975)

ANSWER: Defendant-intervenor cannot admit or deny the matters set forth in this request for the reason that she has no personal knowledge of whether or not such facts are correct and further states that such matters are legislative facts if material.

QUESTION: Delaying the abortion decision or its effectuation can cause psychological and medical problems, especially as the minor approaches the end of the first trimester.

Source: Baird v. Bellotti, 393 F. Supp. 847, 853 (1975)

ANSWER: Defendant-intervenor cannot admit or deny the matters set forth in this request for the reason that she has no personal knowledge of whether or not such facts are correct and further states that such matters are legislative facts if material.

5. QUESTION: There are no greater medical risks in the performance of abortion procedures upon minors than upon adults.

Source: Baird v. Bellotti, 393 F. Supp. 847, 853 (1975)

ANSWER: Defendant-intervenor cannot admit or deny the matters set forth in this request for the reason that she has no personal knowledge of whether or not such facts are correct and further states that such matters are legislative facts if material.

6. QUESTION: Parental support is desirable when an unmarried minor is pregnant.

Source: Baird v. Bellotti, 393 F. Supp. 847, 853 (1975)

ANSWER: The defendant-intervenor admits the truth of facts contained in this request.

7. QUESTION: An appreciable number of parents are not supportive when they discover or are informed that their unmarried daughter is pregnant.

Source: Baird v. Bellotti, 393 F. Supp. 847, 853 (1975)

ANSWER: The defendant-intervenor denies that an "appreciable number of parents are not supportive when they discover or are informed that their unmarried daughter is pregnant."

8. QUESTION: Some minors correctly fear that physical harm would come to them if one or both of their parents knew that they were pregnant.

Source: Baird v. Bellotti, 393 F. Supp. 847, 853 (1975)

ANSWER: Defendant-intervenor cannot admit or deny the matters set forth in this request for the reason that she has no personal knowledge of whether or not such facts are correct and further states that such matters are legislative facts if material.

9. QUESTION: Some parents of pregnant minors would under no circumstances consent to an abortion for their daughters.

Source: Baird v. Bellotti, 393 F. Supp. 847, 853 (1975)

ANSWER: Defendant-intervenor cannot admit or deny the matters set forth in this request for the reason that she has no personal knowledge of whether or not such facts are correct

and further states that such matters are legislative facts if material.

10. QUESTION: Some parents would attempt to make their pregnant minor daughters enter into marriages the daughters do not want.

Source: Baird v. Bellotti, 393 F. Supp. 847, 853 (1975)

ANSWER: Defendant-intervenor cannot admit or deny the matters set forth in this request for the reason that she has no personal knowledge of whether or not such facts are correct and further states that such matters are legislative facts if material.

11. QUESTION: Some minors do not want to inform their parents of their pregnancies because they do not want to cause their parents distress.

Source: Baird v. Bellotti, 393 F. Supp. 847, 853 (1975)

ANSWER: Defendant-intervenor cannot admit or deny the matters set forth in this request for the reason that she has no personal knowledge of whether or not such facts are correct and further states that such matters are legislative facts if material.

12. QUESTION: Some parents would insist that their pregnant minors continue their pregnancies as a punishment or to teach them a lesson.

Source: Baird v. Bellotti, 393 F. Supp. 847, 853 (1975)

ANSWER: Defendant-intervenor cannot admit or deny the matters set forth in this request for the reason that she has no personal knowledge of

whether or not such facts are correct and further states that such matters are legislative facts if material.

13. QUESTION: The incidence of sexual activity among minors is high and consequences of such activity are frequently devastating.

Source: Carey v. Population Services International, \_\_\_\_ U.S. \_\_\_\_, 97 S. Ct. 2010, 2022 (1977)

ANSWER: Defendant-intervenor cannot admit or deny the matters set forth in this request for the reason that she has no personal knowledge of whether or not such facts are correct and further states that such matters are legislative facts if material.

14. QUESTION: Teenage motherhood involves a host of problems, including adverse physical and psychological

effects upon the minor and her baby, the continuous stigma associated with unwed motherhood, the need to drop out of school with the accompanying impairment of educational opportunities and other dislocations including forced marriage of immature couples and the often acute anxieties involved in deciding whether to secure an abortion.

Source: Carey v. Population Services International, \_\_\_\_ U.S. \_\_\_\_, 97 S. Ct. 2010, 2022 (1977)

ANSWER: Defendant-intervenor cannot admit or deny the matters set forth in this request for the reason that she has no personal knowledge of whether or not such facts are correct and further states that such matters are legislative facts if material.

15. QUESTION: Abortion in early pregnancy, that is, prior to the end of the first trimester, although not without its risk, is now relatively safe. Mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low or lower than the rates for normal childbirth.

Source: Roe v. Wade, 410 U.S.  
113, 150 (1973)

ANSWER: Defendant-intervenor cannot admit or deny the matters set forth in this request for the reason that she has no personal knowledge of whether or not such facts are correct and further states that such matters are legislative facts if material.

16. QUESTION: Mortality rates for women are high when abortions are performed illegally.

Source: Roe v. Wade, 410 U.S.  
113, 151 (1973)

ANSWER: Defendant-intervenor cannot admit or deny the matters set forth in this request for the reason that she has no personal knowledge of whether or not such facts are correct and further states that such matters are legislative facts if material.

17. QUESTION: Time, of course, is critical in abortion. Risks during the first trimester of pregnancy are admittedly lower than during later months.

Source: Doe v. Bolton, 410 U.S.  
179, 198 (1972)

ANSWER: Defendant-intervenor cannot admit or deny the matters set forth in this request for the reason that she has no personal knowledge of

whether or not such facts are correct and further states that such matters are legislative facts if material.

Respectively submitted,

JANE HUNERWADEL

By her attorneys,

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[Title omitted in printing]

Defendants' Responses to  
Plaintiffs' Requests for Admissions

Defendants Francis X. Bellotti, et al., respond as follows to plaintiffs' Requests for Admissions:

Request 1. A substantial number of females under the age of 18 are capable of forming a valid consent to an abortion procedure.

Source: Baird v. Bellotti, 393 F. Supp. 847, 855 (1975).

Response 1. Denied. Defendants admit that some females under eighteen are intellectually and emotionally able to comprehend the matters which physicians must discuss with them before performing abortions, see Canterbury v. Spence, 464 F.2d 772,

782, 786-87 (D.C. Cir. 1972); cf.  
Schroeder v. Lawrence, Mass. Adv. Sh.  
286, 289-91 (1977), but defendants  
deny that this ability is equivalent  
to having the legal capacity to give  
legally effective consent under  
Canterbury and Schroeder. See Baird  
v. Bellotti, 393 F. Supp. 847, 854  
fn. 8 (1975).

Request 2. Informed consent is the giving of information to the patient as to just what would be done and its consequences.

Source: Planned Parenthood of Central Missouri v. Danforth,  
U.S. , 96 S. Ct. 2831, 2840, ft. 8  
(1976).

Response 2. Denied. Defendants take the position that informed consent under Massachusetts law is consent within the meaning of the decision of

the United States Court of Appeals for the District of Columbia Circuit in Canterbury v. Spence, 464 F.2d 772, 782, 786-87 (D.C. Cir. 1972) as adopted and interpreted by the Supreme Judicial Court:

[a person capable of granting "legally effective consent" to medical care is one who is competent to evaluate the information which a physician must provide to meet his duty to make] reasonable disclosure of the choices with respect to proposed therapy and the dangers inherently and potentially involved . . . [and the] test for determining whether a particular peril must be divulged is its materiality to the patient's decision:

all risks potentially affecting the decision must be unmasked . . . Cf. Schroeder v. Lawrence, Mass. Adv. Sh. (1977) 286, 290 (referring to Canterbury v. Spence with respect).

Request 3. There are a very low percentage of complications or morbidity in the first trimester in the case of lawful as distinguished from illicitly performed abortions.

Source: Baird v. Bellotti, 393 F. Supp. 847, 853 (1975).

Response 3. Denied. Defendants admit that the complication rates are those shown in Defendants' First Set of Requests for Admissions, Nos.

36-36D.

Request 4. Delaying the abortion decision or its effectuation can cause psychological and medical problems, especially as the minor approaches the end of the first trimester.

Source: Baird v. Bellotti, 393 F. Supp. 847, 853 (1975).

Response 4. Admitted, with the qualification that "can cause" means that such problems may occur. Defendants make no admission as to the frequency of occurrence or magnitude of these problems.

Request 5. There are no greater medical risks in the performance of abortion procedures upon minors than upon adults.

Source: Baird v. Bellotti, 393 F. Supp. 847, 853 (1975).

Response 5. Denied. Defendants admit the truth of the specific data in Defendants' First Set of Requests for Admissions, No. 36C.

Request 6. Parental support is desirable when an unmarried minor is pregnant.

Source: Baird v. Bellotti, 393 F. Supp. 847, 853 (1975).

Response 6. Admitted.

Request 7. An appreciable number of parents are not supportive when they discover or are informed that their unmarried daughter is pregnant.

Source: Baird v. Bellotti, 393 F. Supp. 847, 853 (1975).

Response 7. Admitted, with the qualification that "appreciable number" means that such parents

exist. Defendants make no admission as to the frequency of occurrence or the magnitude of this phenomenon.

Request 8. Some minors correctly fear that physical harm would come to them if one or both of their parents knew that they were pregnant.

Source: Baird v. Bellotti, 393 F. Supp. 847, 853 (1975).

Response 8. Admitted, with the qualification that "some minors" means that such minors exist. Defendants make no admission as to the frequency of occurrence or the magnitude of this phenomenon.

Request 9. Some parents of pregnant minors would under no circumstances consent to an abortion for their daughters.

Source: Baird v. Bellotti, 393 F. Supp. 847, 853 (1975).

Response 9. Admitted, with the qualification that "some parents" means that such parents exist. Defendants make no admission as to the frequency of occurrence or the magnitude of this phenomenon.

Request 10. Some parents would attempt to make their pregnant minor daughters enter into marriages the daughters do not want.

Source: Baird v. Bellotti, 393 F. Supp. 847, 853 (1975).

Response 10. Admitted, with the qualification that "some parents" means that such parents exist. Defendants make no admission as to the frequency of occurrence or the magnitude of this phenomenon.

Request 11. Some minors do not want to inform their parents of their pregnancies because they do not want to cause their parents distress.

Source: Baird v. Bellotti, 393 F. Supp. 847, 853 (1975).

Response 11. Admitted, with the qualification that "some minors" means that such minors exist. Defendants make no admission concerning the frequency of occurrence or the magnitude of this phenomenon.

Request 12. Some parents would insist that their pregnant minors continue their pregnancies as a punishment or to teach them a lesson.

Source: Baird v. Bellotti, 393 F. Supp. 847, 854 (1975).

Response 12. Admitted, with the qualification that "some parents" means that such parents exist. Defendants make no admission concerning the frequency of occurrence or the magnitude of this phenomenon.

Request 13. The incidence of sexual activity among minors is high and the consequences of such activity are frequently devastating.

Source: Carey v. Population Services International, U.S.  
97 S. Ct. 2010, 2022 (1977)

Response 13. Admitted.

Request 14. Teenage motherhood involves a host of problems, including adverse physical and psychological effects upon the minor and her baby, the continuous stigma associated with unwed motherhood, the need to drop out

of school with the accompanying impairment of educational opportunities and other dislocations including forced marriage of immature couples and the often acute anxieties involved in deciding whether to secure an abortion.

Source: Carey v. Population Services International, U.S.  
97 S. Ct. 2010, 2022 (1977).

Response 14. Admitted.

Request 15. Abortion in early pregnancy, that is, prior to the end of the first trimester, although not without its risk, is now relatively safe. Mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low or lower than the rates for normal childbirth.

Source: Roe v. Wade, 410 U.S. 113, 150 (1973).

Response 15. Admitted.

Request 16. Mortality rates for women are high when abortions are performed illegally.

Source: Roe v. Wade, 410 U.S. 113, 151 (1973).

Response 16. Admitted, with the qualification that "high" means only "higher than when performed legally." Defendants make no admission as to the frequency of mortality.

Request 17. Time, of course, is critical in abortion. Risks during the first trimester of pregnancy are admittedly lower than during later months.

Source: Doe v. Bolton, 410 U.S. 179, 198 (1972).

Response 17. Admitted.

By their attorneys,  
FRANCIS X. BELLOTTI  
ATTORNEY GENERAL

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Garrick F. Cole

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Thomas R. Kiley

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Michael B. Meyer  
Assistant Attorneys General  
Government Bureau  
Office of the Attorney General  
One Ashburton Place  
Room 2019  
Boston, Massachusetts 02108  
(617)727-1004

Dated: September 14, 1977

[Title omitted in printing]

Stipulation  
[Concerning Defendants'  
Requests for Admissions]

The parties to the above-captioned action stipulate as follows:

1. The following Requests for Admissions by Gerald Zupnick, filed by defendants, are admitted in addition to the Requests for Admissions previously admitted:

36A (b), (c), (d)

36B (b), (c), (d)

36C (b), (c), (d)

36D (b), (c), (d)

38 (c)

39 (c)

40 (c)

41 (c)

42 (b), (c)

43

44

45

46 (b), (c)

49

53 (b), (c), (d)

55 (b), (c), (d)

67 (c), (d)

69 (c), (d)

70 (b), (c), (d)

73 (c), (d)

76 (b), (c), (d)

78 (c), (d)

79 (b), (c), (d)

47 (b), (c)

48 (b), (c), (d).

2. Defendants agree that Requests for Admissions 10-35 are denied.

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Joseph J. Balliro, Esq.

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Michael B. Meyer, Esq.

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Brian Riley, Esq.

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John H. Henn, Esq.

October 18, 1977

[Title omitted in printing]

Order

[On Request for Admissions]

November 14, 1977

After careful consideration of the defendants' requests for admissions and the plaintiffs' responses thereto, as well as the memoranda submitted by counsel, the Court denies the Defendants' Motion that Defendants' Requests for Admissions be Deemed Admitted. The Court has concluded that the admission of the requests in question would be prejudicial to the plaintiffs' case. Accordingly, the following requests for admissions are not deemed by the Court to be admitted: 5; 36(c); 50(c), (d); 51(c), (d); 52 (c), (d); 54(b), (c), (d); 60(c), (d); 61(c), (d); 62(c), (d); 63(c), (d); 64(c), (d); 65(c), (d); 66(b), (c), (d); 68(b), (c), (d);

74(b), (c), (d); 75(c), (d); 77(b), (c), (d); and 80(c), (d). The plaintiffs and amici no longer challenge requests for admissions 50(b) and 51(b). These are therefore deemed admitted.

The Court reserves the right at this point to assess costs against the plaintiffs if it determines at some future time that the plaintiffs' actions have been unreasonable.

In view of the Court's disposition, the defendants shall inform the Court in writing within seven (7) days whether they wish to reopen the evidence in order to present additional matters or to rest their case on the evidence already presented. If the defendants choose the former alternative, they are requested to provide the Court with an estimation of the time so needed and

which specific requests for admissions will be involved in reopening the evidence.

It is so ORDERED.

[Letterhead omitted in printing]

Correspondance Among Counsel and Related Documents Concerning Immature/Mature Minor Issue

s/Baily Aldrich  
Senior Circuit Judge

November 9, 1977

s/Anthony Julian  
Senior District Judge

Joseph J. Balliro, Esq.  
One Center Plaza  
Boston, Massachusetts 02108

s/Frank H. Freedman  
District Judge

Re: Baird v. Bellotti  
USDC Civil Action  
No. 74-4992-F

Dear Mr. Balliro:

Upon reviewing the transcript of the trial of the above-captioned case, I recalled that the Court indicated (at II-192, 194) that plaintiffs should inform all parties whether their challenge to G.L. 112, § 12S includes or excludes immature minors.

Accordingly, please inform the Attorney General in writing whether you plan to argue in your post-trial brief that § 12S is unconstitutional on its face with respect to its effect upon immature minors.

I appreciate your attention to this matter.

Very truly yours,

Michael B. Meyer  
Assistant Attorney General

cc: Brian A. Riley, Esq.  
John H. Henn, Esq.

[Letterhead omitted in printing]

November 16, 1977

Michael B. Meyer  
Assistant Attorney General  
One Ashburton Place  
Boston, Mass. 02108

Re: Baird v. Bellotti

Dear Mr. Meyer:

You have inquired of us in your letter of November 9, 1977 as to our position as to the scope of M. G. L. c. 112 § 12S with regard to so-called "immature minors".

It is the plaintiff's position that "immature minors" is not a term of art. The statute speaks in terms of the "consent" of the mother.

Inherent in the term consent is the capacity to give that consent and it is our position that the only limitation that can be placed on a minor consenting to an abortion is her capacity to give that consent. If by "immature minor" you limit your definition to one incapable of giving consent, we have no trouble with that phrase or any other you choose to describe one unable to give consent.

Very truly yours,

Joseph J. Balliro

cc: Brian A. Riley, Esq.

John H. Henn, Esq.

[Letterhead omitted in printing]

November 17, 1977

Joseph J. Balliro, Esq.  
One Center Plaza  
Boston, Massachusetts 02108

Re: Baird v. Bellctti  
USDC Civil Action  
No. 74-4992-F

Dear Mr. Balliro:

Thank you for your letter of November 16, 1977.

If we assume for the purposes of this question that "immature minor" means a minor who is unable to give legally effective consent, please inform the Attorney General in writing whether you plan to argue in your

post-trial brief that § 12S is unconstitutional on its face with respect to its effect upon immature minors.

I appreciate your continued attention to this matter.

Very truly yours,

Michael B. Meyer  
Assistant Attorney General

cc: Brian A. Riley, Esq.  
John H. Henn, Esq.

[Letterhead omitted in printing]

November 18, 1977

Michael B. Meyer, Esquire  
Attorney General's Office  
McCormack Building  
One Ashburton Place  
Boston, Massachusetts

Dear Mr. Meyer:

Re: Baird v. Bellotti  
USDC Civil Action  
No. 74-4992-F

I have your letters of November 9 and 17, and Mr. Balliro's of November 17 concerning the issue of the facial invalidity of § 12S. It is the position of amici that § 12S is invalid on its face -- period. This is so, as plaintiffs and amici have

argued, and the evidence has shown at trial, because the statute's third-party consent requirements are unduly burdensome, and discriminate against the right of a mature minor woman to terminate her pregnancy. The fact that some minors are unable to give legally effective consent to termination of their pregnancies, and thus always require some form of third party consent in a variety of contexts, does not save this overbroad statute, nor suggest to us any narrowing and constitutionally acceptable construction.

Yours sincerely,

John H. Henn

[Letterhead omitted in printing]

November 28, 1977

Michael B. Meyer  
Assistant Attorney General  
One Ashburton Place  
Boston, Massachusetts 02108

Re: Baird v. Bellotti

Dear Mr. Meyer:

In response to your inquiry of November 17, 1977, this is to advise you that what we intend to argue is that M. G. L. c. 112 § 12S is unconstitutional in that it limits a minor capable of giving consent from giving that consent to an abortion.

If you insist on using the term "immature", I repeat, as I noted to you in my letter to you dated November

16, 1977, that I do not consider that term to be one of art. In short, we intend to write our brief in response to the terms used by the statute itself.

Very truly yours,

Joseph J. Balliro

cc: Brian A. Riley, Esq.  
John H. Henn, Esq.

[Title omitted in printing]

Memorandum and Order

[On Immature/Mature Minor Issue]

November 29, 1977

In response to defendants' motion for compliance filed November 28, 1977, and a review of the record, the court agrees with defendants that Mr. Balliro's letter of November 16, 1977 is not altogether clear. It does find Mr. Henn's letter of November 18 to be clear, and adequate. Mr. Balliro is ordered to make further response, within five days of the date hereof.

s/Baily Aldrich  
Senior Circuit Judge  
s/Anthony Julian  
Senior District Judge  
s/Frank H. Freedman  
District Judge

[Title omitted in printing]

Plaintiffs' Further Response  
to the Order of the Court Dated  
November 29, 1977

In response to the Court's Order, plaintiffs state that: Plaintiffs will argue that Mass. Gen. Laws Ch. 112 § 12S is unconstitutional with regard to those minors who are capable of giving consent to an abortion, and will not argue that it is unconstitutional with regard to minors who are not covered by the express terms of the statute, i.e., those minors who are not capable of giving consent.

By their attorney,

---

Joseph J. Balliro  
65 East India Row, 30F  
Boston, Massachusetts 02110  
227-5822

December 5, 1977

[Letterhead omitted in printing]

[Correspondance and related documents concerning Planned Parenthood, et al's post-trial arguments]

December 23, 1977

Clerk, United States  
District Court  
Room 1525  
U.S. Post Office and Courthouse  
Boston, Massachusetts 02109

Re: Baird v. Bellotti,  
Civil Action No. 74-4992-F

Dear Sirs:

Would you please advise the Court that amici do not intend to burden the Court with an elaborate response to defendants' post-trial brief.  
(Amici's brief on the substantive

merits was filed at the time of trial.) Amici do believe, however, that a brief comment on defendants' post-trial brief would be useful, especially with respect to what this case does and does not involve.

The first two parts of the argument in defendants' post-trial brief (pp. 13-55), as well as much of the introductory material in that brief, completely misinterpret plaintiffs' claim that the parental/judicial consent statute is unconstitutional "on its face". The reference to "on its face" simply means that the unconstitutionality of the statute as applied to plaintiffs' class can be determined from the text of the statute alone (as construed by the state court.) It has nothing to do with classic First Amendment facial overbreadth, or First Amendment facial vagueness concepts. Thus, the first

two substantive sections of defendants' brief are irrelevant to the claims in this case.

This case is a class action, not an action in which named plaintiffs seek to invoke the rights of unknown and hypothetical third parties, as would be the situation with a First Amendment facial overbreadth attack. The class was specifically described by this Court as including "the class of unmarried minors in Massachusetts who have adequate capacity to give a valid and informed consent and who do not wish to involve their parents." Baird v. Bellotti, 393 F. Supp. 847, 851 851 (1975).<sup>1</sup> The statute

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1 The quoted words describe the class represented by plaintiff Mary Moe. As to the so-called "immature minor,"  
(footnote cont.)

is being challenged as unconstitutional with respect to that class. In this respect, the challenge here is procedurally identical to the successful class action challenge to spousal or parental consent in Planned Parenthood v. Danforth, 428 U.S. 52, 57, 62 (1976).

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(footnote cont.)

this Court held in its 1975 decision that plaintiffs Parents Aid Society and Dr. Zupnick "have standing to attack the statute as applied to all minors, at least insofar as it requires the consent of both parents" [emphasis added], in the light of "the custom to proceed on the consent of only one parent." Id. at 852. Cf. Baird v. Attorney General, Mass. Adv. Sh. (1977) 96, 110.

There are only two substantive issues in this case: whether the statute impermissibly burdens due process rights, and whether it denies unmarried pregnant minors the equal protection of the laws. The paragraphs of plaintiffs' First Amended complaint (¶¶22-23) concerning the overbreadth of a requirement of parental consultation in every case, and concerning the vagueness of the "best interest of the child" standard, should be read merely to state grounds for the conclusion that the statute is impermissibly burdensome under the due process clause. These two paragraphs do not and cannot transfer this case into one involving First Amendment facial overbreadth or facial vagueness issues.

The actual merits of the case -- whether the statute impermissibly burdens due process rights, and

whether it unconstitutionally discriminates -- are discussed in amici's brief at pp. 5-53, and in defendants' post-trial brief at 56-104 (especially 56-96), and we wish to make only one comment. On the matter of whether the requirement to go to court creates an undue burden, defendants rely enormously (see their brief at p. 59) on a remark made by Judge Aldrich at the April 13, 1977 hearing concerning his conclusive assumption of speed, diligence, and proper procedure and consideration by the state court. We do not believe this comment by Judge Aldrich amounts to a ruling that the requirement of commencing court proceedings cannot be burdensome, but rather only that this Court assumes that the state courts will do the best job they can, and will do it in good faith, within the existing state judicial system. It is a manipulation of this remark to

conclude that it bars all efforts by plaintiffs or amici to show that there are inherent institutional burdens to bringing suit in Massachusetts which, even with the best of faith and effort by state court system personnel, create a significant burden for an unmarried pregnant minor.<sup>1</sup>

Yours sincerely,

John H. Henn  
Counsel for Planned Parenthood  
League of Massachusetts,  
et al.,  
Amici Curiae

cc: All counsel of record

---

<sup>1</sup> The heading in the chart at p. 27 of amici's brief should read: "counties/months in which there were no sessions or no civil sessions" (the words "no sessions or" were inadvertently omitted).

[Letterhead omitted in printing]

December 27, 1977

Tuesday, if no objections are received, or, if counsel wish to file a response, I shall circulate both.

John J. Henn, Esquire  
Foley, Hoag & Eliot  
10 Post Office Square  
Boston, Massachusetts 02109

Dear Mr. Henn:

Re: Baird v. Bellotti  
No. 74-4992-F

In response to your letter of December 23, I am instructed by the court that no further briefs were to be filed without motion and that I should not circulate your letter. I shall, however, circulate it next

Very truly yours,  
s/George F. McGrath  
Clerk  
U.S. District Court

cc: Joseph J. Balliro, Esquire  
Garrick F. Cole, Esquire  
Michael B. Meyer, Esquire  
Brian A. Riley, Esquire

[Title omitted in printing]

Defendants' Opposition to the  
Circulation of Amici's Letter  
of December 23, 1977

Defendants oppose the circulation  
of Amici's letter of December 23, 1977  
to the Court, and state as their  
reasons as follows:

1. The Court, in its oral  
order of October 18,  
1977, ordered that reply  
briefs would only be  
filed after a motion for  
leave to file reply  
briefs had been  
granted. Tr., October  
18, 1977, at 202.
2. Amici have filed no  
motion for leave to file  
reply briefs.

3. Amici's letter of  
December 23, 1977 is in  
fact a reply brief in  
the guise of a letter to  
the Clerk.

By their Attorneys,

FRANCIS X. BELLOTTI  
ATTORNEY GENERAL

---

Garrick F. Cole

---

Thomas R. Kiley

---

Michael B. Meyer  
Assistant Attorneys General  
Government Bureau  
Department of the Attorney  
General  
One Ashburton Place  
Boston, Massachusetts 02108  
(617) 727-1038

December 30, 1977

[Title omitted in printing]

Amici's Motion for Leave to File  
Responsive Letter to Defendants'  
Post-Trial Brief

Amici Planned Parenthood League of Massachusetts, et al., move that its letter of December 23, 1977 be deemed to be duly filed as in the nature of a reply memorandum to defendants' post-trial brief.

As grounds for this motion, amici says that it filed its substantive brief at the time of trial in October, 1977, that defendants only filed their substantive brief in December, 1977 and thus had two months to prepare their brief in light of the arguments previously made by amici (and by plaintiffs), and that fairness dictates that amici be permitted a brief comment on defendants' brief.

This is particularly so where amici's letter simply points out that defendant's brief strenuously and extensively argues an issue (first amendment facial overbreadth/vagueness) which amici and plaintiffs do not even raise.

By its attorneys,

---

John H. Henn  
Foley, Hoag and Eliot  
10 Post Office Square  
Boston, Massachusetts 02109  
617-482-1390

[Dated: December 29, 1978]

(Title omitted in printing)

CAROL COOPERMAN NADELSON

ORDER

[On Motion to Dissolve  
Preliminary Injunction]

December 29, 1977

The defendants have moved to dissolve the preliminary injunction entered by this court on February 10, 1977 enjoining them from enforcing Mass. Gen. Laws ch. 112, §12P or, in the alternative, to modify the injunction by enjoining enforcement of the statute only insofar as it applies to mature minors in the first trimester. The court denies the defendants' motion. Judge Julian dissents from this denial.

By Order of the Court,

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Chief Deputy Clerk

Born:	October 13, 1936, Brooklyn, New York
Married:	Dr. Theodore Nadelson; 2 children
Address:	30 Amory Street, Brookline, Mass. 02146 566-5890
1957	B.A. Magna Cum Laude, Brooklyn College, Brooklyn, N.Y.
1961	M.D. With Honor, University of Rochester School Medicine, Rochester, N.Y.
1959	NIMH Fellowship in Pediatrics, University of Rochester (Summer)
1960	NIMH Fellowship in Psychiatry, University of Rochester (Summer)
1961-62	Intern (Medicine), University of Rochester, Strong Memorial Hospital, New York
1962-64	Resident in Psychiatry, Massachusetts Mental Health Center
1962-65	Teaching Fellow in Psychiatry, Harvard Medical School

		1972-73	Assistant Psychiatrist, Beth Israel Hospital, Boston
1964-74	Boston Psychoanalytic Institute, Candidate	1973-77	Associate Psychiatrist, Beth Israel Hospital, Boston
1964-66	Resident in Psychiatry, Beth Israel Hospital, Boston	1973	Assistant Professor of Psychiatry, Harvard Medical School
1965-66	Research Fellow in Psychiatry, Harvard Medical School	1973	Assistant in Psychiatry, Childrens Hospital
1966-70	Assistant in Psychiatry, Beth Israel Hospital, Boston	1973	Medical Center, Boston
1966-68	Psychiatric Consultant, Peace Corps.	1973	Consultant, Department of Adolescent Medicine, Childrens Hospital
1967-69	Career Teacher in Psychiatry, Harvard Medical School	1973	Medical Center
1968-70	Special Lecturer, Simmons College, School of Social Work	1971,73	Faculty, Graduate Office Psychiatry for Physicians, Faulkner Hospital
1969-72	Clinical Instructor in Psychiatry, Harvard Medical School	1973,74	Faculty, Postgraduate Course, Office Psychiatry for Physicians, Faulkner Hospital
1969-70	Fellow, Radcliffe Institute	1973	Faculty Postgraduate Course, Pediatrics, Childrens Hospital
1970-72	Associate in Psychiatry, Beth Israel Hospital	1973	Medical Center
1971	NIMH Fellowship, Sex Research Institute, Indiana University (Summer)	1974	Faculty, Radcliffe Institute
1972-74	Staff Liaison Psychiatrist with Obstetrics-Gynecology Department of Beth Israel Hospital		Director Medical Student Education, Department of Psychiatry, Beth Israel Hospital, Boston

1974	Member, Boston Psychoanalytic Institute and Society, Inc.	1969	Member, Massachusetts Medical Society
1974,75	Faculty Postgraduate course Adolescent Medicine, Children's Hospital Medical Center Guest Lecturer, Harvard Summer School - Health Sciences Extension Division Faculty, Boston Psychoanalytic Society and Institute	1969	Member, Harvard Medical Area Women's Group
1975	Counsellor, Office of Student Affairs, Harvard Medical School	1970	Member, American Medical Women's Association
1975	Associate Professor of Psychiatry, Harvard Medical School	1971	Member, Association for Academic Psychiatry
1975	Psychiatrist, Beth Israel Hospital, Boston	1973	Member, Group for the Advancement of Psychiatry (GAP)
		1974	Committee on the Family
		1974	Member, American Psychopathological Association
1975		1974	Fellow, American Psychiatric Association
1976		1976	Nominee, Boylston Society Award for Teaching Excellence in the Basic Sciences, Harvard Medical School
1977		1977	Fellow, American College of Psychiatry
		1977	Member, Eastern Association of Sex Therapists
<b>PROFESSIONAL MEMBERSHIPS AND HONORS</b>			
1957	Phi Beta Kappa		
1961	Alpha Omega Alpha		
1961	Benjamin Rush Award in Psychiatry, University of Rochester		
1968	Member, American Psychiatric Association and Northern Psychiatric Society		
		<b>LICENSES:</b>	
		Massachusetts #27405	
		California #G12331	

PUBLICATIONS:

1. Nadelson, C.: "The Philosophy of Day Care"; Harvard Newsletter, Vol. 3 No. 4, Feb., 1971.
2. Nadelson, C.: "Women in Surgery", Arch. Surg., 102:234, March, 1971.
3. Nadelson, C.: "The Development of a Day Care Center", J.A.M.W.A. 26:7 347-351, 1971
4. Nadelson, C. and Notman, M.,: "The Woman Physician", J. Med. Educ. 47:176-183, 1972.
5. Nadelson, C.: "Psychological Issues in Therapeutic Abortion", J.A.M.W.A. 27:1, 12-15, 1972
6. Nadelson, C., Bassuk, E.,: "A Dilemma in Medical Education", J. Med. Educ. 47:11, November, 1972.
7. Nadelson, C., and Lowry, P.: "Family Planning Services in Massachusetts, Report of Health Subcommittee, Governor's Commission on the Status of Women, March, 1972.
8. Nadelson, C.": "Normal and Special Aspects of Pregnancy" Obstetrics and Gynecology, 41:4, 611-620, 1973.
9. Lowry, P. and Nadelson, C.: "Should We Repeal the Abortion laws?" Boston Globe, October 29, 1972; "Man and Science in Modern Society" Reprinted (1973).
10. Nadelson, C., Hagen, D.: "Consultation with Non-Psychiatric Physicians". The Psychiatrist as a Teacher, National Conference Proceedings. George Washington University, Psychiatry Dept., 1973.
11. Nadelson, C., and Notman, M.: "Medicine, A Career Conflict for Women" American Journal of Psychiatry, 130:6, 1123-1127, 1973.
12. Nadelson, C., Nadelson, T.: "Reflex and Reflection--Definition of Psychotherapy in Supervision." In Mogstad TE, Magnussen, F. What is Psychotherapy. Proceedings 9th Internat'l. Cong. of Psychotherapy, Karger Basel 1975.
13. Notman, M., Nadelson, C.: "Training Women for Medical Careers", World Journal of Psychosynthesis. 5:6 20-25, 1973.
14. Nadelson, C.: Adjustment, New Approaches to Women's Mental Health. In "The American Woman: Who Will She Be?" Glencoe Press, 1974.
15. Nadelson, C., Notman, M.: "Success or Failure: Women As Medical Students" J.A.M.W.A. 29:4, 167-172, April, 1974.
16. Nadelson, C.: "Abortion Counseling: Focus on Adolescent Pregnancy" Pediatrics, Dec., 1974., Vol. 54, No. 6.

17. Nadelson, C., Notman, M., Aarons, E., Feldman, J.: "The Pregnant Therapist" *Am. J. Psych.*, Vol. 131:10, Oct. 1974. Reprinted in *Inventory of Marriage and Family Literature*, Vol. 3, 1974.
18. Nadelson, C., Bassuk E., Hopps C., Boutelle, W.,: "Conjoint Marital Psychotherapy: Evaluative Procedures. *Social Casework*, 56:2, 91-96, Feb. 1975.
19. Nadelson, C., Bassuk, E., Hopps, C., Boutell, W.,: "Conjoint Marital Psychotherapy: Treatment Techniques", *Dis. Nerv. Syst.* (in press).
20. Nadelson, C., Bassuk, E.; "Pregnancy and Abortion in a Masochistic Character" *Psychiatric Opinion*, Feb. 1975. 12:2, 37-42.
21. Nadelson, C.: "The Pregnant Teenager: Problems of Choice in a Developmental Framework", *Psychiatric Opinion*, Feb. 1975, 12:2, 6-12.
22. Nadelson, C. and Nadelson, T.: "Development Determinants of Sexuality", *Psychiatric Opinion* 12:5, 14-19, May 1975.
23. Nadelson, C.: "Data Base Collection in Obstetrics and Gynecology" in Ryback, R., The Problem Oriented Record in Psychiatry and Mental Health Care. Grune and Stratton Inc., New York, 1974.
24. Nadelson, C.: "Increasing the Number of Women Physicians: Problems and Directions" Case Western Reserve Medical Alumni Bulletin 38:4-6, Nov. 1974.
25. Nadelson, C.: "Inadequate Contraceptive use Among Sexually Active Adolescents." Medical Aspects of Human Sexuality. 10:1, 99-100, Jan. 1976.
26. Nadelson, C.: "Telling a Teenager or Family About a Genetic or Other Sexual Disorder." Medical Aspects of Human Sexuality 10:2, 47-48, Feb. 1976.
27. Nadelson, C., Rosenfeld, R., Krieger, M., Backman, J. "The Sexual Misuse of Children." *Psychiatric Opinion* 13:2, 6-12, April 1976.
28. Nadelson, C. "Pregnancy in the Adolescent." Basic Handbook of Child Psychiatry (in press).
29. Nadelson, C. "Current Impact of Women's Rights." Basic Handbook of Child Psychiatry (in press).
30. Nadelson., Notman, M. "Psychiatric Treatment of the Pregnant Teenager and the Putative Father." Current Psychiatric Therapies (in press).
31. Nadelson, C., Notman, M. "The Rape Victim: Psychodynamic Considerations." *Am. J. Psychiatry* 3:4, 408-413, April 1976.

32. Nadelson, C., Notman, M. "Psychological Responses to Rape." Psychiatric Opinion (in press).
33. Nadelson, C. "Emotional Sequelae to Adoption." American Family Physician, 14:124-127, September, 1976.
34. Nadelson, C., Bassuk, E., Hopps. C., Boutelle, W. "The Use of Videotape in Couples Therapy." Interna. J. Group Psychotherapy, 27:2 241, April, 1977.
35. Nadelson, C. "Beyond the Pale No Longer" (teaching Human Sexuality). Harvard Med. Alum. Bulletin. 50:3, 13-15, 1976.
36. Nadelson, C., Notman, M. "Psychotherapy Supervision: The Problem of Conflicting Values." Am. J. Psychotherapy 31:2, 2, 275-283, 1977.
37. Nadelson, C., Notman, M., "Emotional Repercussions of Rape." Medical Aspects of Human Sexuality, 11:3, 16-31, March 1977.
38. Nadelson, C. Rosenfeld, A., Backman, J. Krieger, M. "Incest and Child Abuse" J. Acad. of Child Psychiatry, 16:2, 327-339, Spring, 1977.
39. Nadelson, C., Brogonier, R. "Caring for the Rape Victim, Interact. 1:3 1-12, 1977.
40. Nadelson, C. Notman, M., Bennett, M. "Angst voor Prestatie bij Vrouwen", Tijdschrift voor Psychotherapie, 6:243-252, January, 1977.
41. Nadelson, C., Notman, M. "Conflicts in Identity and Self Esteem for Women", McLean Hospital Journal 2:1, 1977.
42. Nadelson, C., Notman, M. "The Role of the Psychiatrist in Obstetrics-Gynecology Liaison Psychiatry", in Psychiatry in General Medical Practice edited by G. Usdin and J. Lewis. McGraw Hill, New York.
43. Nadelson, C., Notman, M., Hilberman, E. "The Rape Victim", in Modern Legal Medicine and Forensic Science edited by W. Curran and L. McGarry. (in press).
44. Nadelson, C., Notman, M. "Women as Health Care Professionals", Encycl. of Bioethics (in press).
45. Nadelson, C., Notman, M. "Women as Patients", Encycl. of Bioethics (in press).
46. Nadelson, C. "Evaluation of Sexual Dysfunction", In Lazare, A., Outpatient Psychiatry, (in press).
47. Nadelson, C. "Treatment of Sexual Dysfunction" in Lazare, A. Outpatient Psychiatry (in press).

48. Nadelson, C., Notman, M.  
 Poussaint, A. "Early Clinical  
 Exposure in the Teaching of  
 Behavioral Sciences", J. Med.  
Educ., (in press).
49. Nadelson, C., Notman, M.  
 "Emotional Aspects of the  
 Symptoms, Functions and Disorders  
 of Women", in Psychiatric Medicine  
 edited by G. Usdin, Brunner/Mazel.  
 (in press).

FILM:

The Labor of Love--Pregnancy and  
 Childbirth, 1973.

REFEREE:

New England Journal of Medicine,  
 Psychiatry in Medicine, Medical  
 Economics  
 American Journal of Psychiatry.

Tapes:

Psychological Aspects of Managing  
 the Teenage Pregnancy. Audio  
 Digest Foundation Pediatrics. Vol.  
 19, No. 21, November 13, 1973.  
 The Rape Victim: Psychodynamic  
 Considerations. Audio Cassette  
 Tape Program, American Psych.  
 Assn. 1975.  
 Psychological Aspects of Pregnancy  
 and the Pregnant Therapist.  
 Behavioral Sciences Tape, January  
 1975.

BOOK REVIEWS:

Psychosomatic Medicine, Mass.  
 Journal of Psychiatry, American  
 Journal of Psychiatry,  
 Contemporary Psychology, Social  
 Science and Medicine, New England  
 Journal of Medicine, Mental  
 Health, American Journal of  
 Psychotherapy, Journal of the  
 Academy of Psychoanalysis.

Contributor:

Medical Aspects of Human  
 Sexuality, Hospital Tribune,  
 Psychiatric Opinion.

SPECIAL PROFESSIONAL ACTIVITIES:

1970	Medical Student Advisor, Class of 1973, 1974, 1975, 1976.
1970-72	Staff Council Representative, Department of Psychiatry, Beth Israel Hospital.
1970-72	Harvard Medical School Admission Subcommittee II
1971	Speaker's Bureau, American Medical Women's Association
1971-74	Secretary, Northern New England District Branch, APA
1972	American Psychiatric Association Task Force on Women

1972	Consultant on Admission to Medical School, Harvard University, Office of Career Development.		Education of Psychiatrists, American Psychiatric Association
1972	Consultant, Boston University Medical School, Development of a Curriculum for Human Sexuality.	1974,75	Consultant, National Institutes of Mental Health, Psychiatry Education Branch
1972-75	Harvard Medical School, Admission Committee Chairman, Subcommittee IV	1974	School Consultant, St. Pauls School Concord New Hampshire, Groton School, Groton, Mass. Milton Academy, Milton, Mass. Mental Health Committee, Mass. Medical Society
1972	Harvard Medical School Admissions Committee	1975	Steering Committee, National Institute of Mental Health
1972	Thesis Advisor, Boston University, Department of Psychology; Harvard Graduate School of Education		Grant "The Psychiatrist as a Teacher."
1973	Northern New England District Branch, APA, Task Force on Sex Education	1975	President, Massachusetts Psychiatric Association
1973	Student-Faculty Committee Harvard Medical School	1975	Committee on Medical Education, Amer. Psych. Assn.
1973	Postgraduate Education Committee, Harvard Medical School	1975	Workshop Planning Committee, The Psychiatrist as a Teacher IV
1973	Editorial Board, Psychiatric Opinion	1976	Faculty Council, Harvard Medical School
1973-75	Secretary, New England Branch, American Medical Women's Association	1976	Secretary, Association for Academic Psychiatry
1974-75	President-elect, Massachusetts Psychiatric Association	1976	Psychiatry Training Review Committee, National Institute of Mental Health.
1974	Preparatory Commission on Faculty for Conference on		Nominating Committee, American Psychiatric Association.

1976 Committee on Institute Analysis, Boston Psychoanal. Inst.  
1976 Steering Committee, American Psychiatric Association Educational Development Grant  
1976 Nominating Committee, Association for Academic Psychiatry

TEACHING:

- 1) Harvard Medical School Students - Coordinator and director of psychiatry teaching program, Beth Israel Hospital.
  - a. I--Behavioral Sciences Seminar
  - b. II--a) Human Sexuality (Steering Committee, lecturer, group leader, coordinator)
  - b) Introduction to the Clinic and physical diagnosis - Director and coordinator
  - c. Principle Clinical Year Clerkship--Supervision and planning of clerkship evaluations and psychotherapy.
  - Electives--Clinical Aspects of Sexual Dysfunction, Clinical Supervision, Seminar on Adolescence; supervision and planning of electives.

- 2) Beth Israel Hospital
  - A. Residency Training Program in Psychiatry
    1. Supervision and development of training program in Psychotherapy of couples
    2. Elective Seminar, Couples Therapy
    3. Didactic Seminar, First year residents and psychology interns--Psychosis
    4. Staff Conferences--Family and Couples Therapy
    5. Supervision of long and Short term psychotherapy, Couples and family therapy
    6. Adolescent Case Conference--Child Psychiatry
  - B. Obstetrics and Gynecology Liaison
    1. Supervision of consultation and teaching residents and psychology trainees
    2. Conference on psychiatric aspects of Obs-Gyn, including human sexuality
    3. Development, teaching and administration of program for therapeutic abortion and other consultations for Obs-Gyn

4. Development of guidelines of psychiatric and social service consultation for Obs-Gyn Department
5. Development of Sexual Dysfunction Consultation Liaison and clinic
- C. Medical Liaison--1965-70
  1. Group-ward personnel, dietary interns
  2. Supervision of Psychiatric residents on medical liaison
  3. Ward rounds and teaching
- 3) Undergraduate teaching
  - a. Harvard College/Radcliffe College  
Social Relations--"Youth", 1967  
Social Relations--"Medical Sociology" 1968  
Junior Tutorial--"Pregnancy and Abortion", 1973  
Human Sexuality, 1975  
Psychological and Social Aspects of Medicine, 1972, 73, 74. --Discussion of "abortion", and "rape."

- 4) Graduate School Teaching
  - a. Simmons College Graduate School 1968-70 Human Growth and Development
  - b. Boston University thesis advisor 1972 and 1974
  - c. Harvard School of Education, 1973, thesis advisor
  - d. Health Sciences
- 5) Radcliffe Institute
  - a. Psychological Development and Clinical Issues of Women, 1973-74  
1974-75  
1975-76  
1976-77
- 6) Psychiatry Department Committees on Curriculum
  - a. Committee on Clinical Teaching, 1975-
  - b. Committee on Introduction to Clinical Medicine, 1976-
- 7) Interdepartmental Committees on Curriculum - Primary Care Elective Committee, 1976

8) Preterm, Inc.

a. Course - Counselling Adolescents, 1976

9) Other Medical School and Hospital and Hospital and Agency Teaching

- a. Special Lectures at Boston University, Tufts Medical Schools, University of Vermont, Case Western Reserve, University of Colorado, State University of New York, Downstate.
- b. Lectures and Rounds at Massachusetts Mental Health Center and Boston State Hospital, Framingham Mental Health Association, Boston Veteran's Administration Hospital, Massachusetts General Hospital, Peter Bent Brigham Hospital, Boston Family Service.
- c. Seminar Series on Couples Therapy to the Family Service Agencies of Greater Boston.
- d. Guest Lectures for Community Sex Information, Planned Parenthood.
- e. Seminar series -Adolescent psychology, Children's Hospital Medical Center, Adolescent Medicine Unit.

f. Guest speaker - Michigan Psychiatric and Psychoanalytic Society, Washington, D.C. Psychiatric Society.

RESEARCH IN PROGRESS:

- 1. Attitudes of male and female patients toward male and female physicians.
- 2. Sexual attitudes and information of pregnant adolescent girls compared with non-pregnant adolescents; development of psychologically-oriented programs of communicating with adolescents in groups and individually about sexuality.
- 3. Assessment of success criteria in the psychiatric treatment of married and non-married couples.
- 4. Development of comprehensive care program for pregnant adolescents in conjunction with Children's Hospital Medical Center.
- 5. Development of a Program for the Treatment of Problems in Sexual Functioning.
- 6. Study of the stress areas during medical school, especially for women students.
- 7. Development of a Program of Crisis Intervention for Rape Victims.

8. Study of adolescent developmental conflicts in achievement, and cognitive growth in high school.

PRESENTATIONS:

1970	"Abortion", Unitarian Universalist Women's Federation Symposium	1972	"Psychological Issues in Abortion"; Massachusetts Mental Health
1971	"Therapeutic Abortion", Massachusetts Organization for the repeal of Abortion Laws	1972	"Day Care"; Children's Hospital Medical Center
1971	"Day Care", MIT	1972	"Psychological Aspects of Abortion"; Planned Parenthood of Massachusetts
1972	"Problems of Professional Women", Women Architects Group	1972	"Adolescent Pregnancy" 1) Mary Eliza Mahoney Family Life Center; 2) Family Health Unit--Children's Hospital Medical Center
1971	"The Family and Changes in Women's Roles", New England Council of Reform Synagogues	1972	"Clinical Management of Sexual Dysfunction Problems": 1) Chelsea Naval Hospital; 2) McLean Hospital
1971	"The Woman in Medicine", Harvard Medical Area Women's Group	1972	"Sex Roles in Mothers and Children", Children's Hospital Medical Center
1972	"The Changing Role of Women", Massachusetts Mental Health Center	1972	"Medicine, A Career Conflict for Women", American Psychiatric Association Convention, May, 1972.
1972	"Therapeutic Abortion", its implications to Society and Nursing Assoc.	1972	"Women in Medicine", New England Women's Medical Association
1972	"Alternatives in Child Rearing"; Child Psychiatry Department, Tufts University Medical School	1972	"New Dimensions for Maternity Homes--Abortion" Florence Crittenton Association of America
		1973	"Abortion, Changing Picture", Boston Veteran's Administration Hospital

1973	"Adolescence, Psychological Aspects", Children's Hospital Medical Center	1974	"Research Problems - Pregnancy and Abortion", University of Illinois, Medical School, Institute for Juvenile Research
1973	"Are Women's Roles Changing?" McLean Hospital	1974	"Innovative Methods of Treating Sexual Dysfunction", Planned Parenthood and American Association of Sex Education and Counsellors, January, 1974
1973	"Adjustment, New Approaches to Women's Mental Health" University of Georgia	1974	"Biological and Psychological Aspects of Sexual Differences", McLean Hospital Academic Conference
1973	"Success or Failure, Women as Medical Students", American Psychological Assoc.	1974	"The Choice of Sex of Therapist", American Orthopsych. Assoc., San Francisco, California, April, 1974
1973	"Family Dynamics", Children's Hospital Medical Center	1974	"The Pregnant Therapist", San Francisco, California (American Orthopsych. Assoc.)
1973	"Teen Age Pregnancy", American Psychiatric Association, Honolulu, Hawaii, May, 1973, Annual Meeting	1974	"Community Day Care", American Psychiatric Association, May, 1974
1973	"Conjoint Couples Therapy--Evaluative Techniques", "Reflex and Reflection--Definition of Psychotherapy in Supervision", International Congress on Psychotherapy. Oslo, Norway, June, 1973	1974	"New Dimensions in Psychotherapy Supervision", American Psych. Assoc., May, 1974
1973	"Success or Failure: Women as Medical School Applicants" American Psychological Association, Montreal, Canada, August, 1973	1974	"Sexual Trauma in Children", Postgraduate Course in Adolescent Medicine
1973	"The Management of Pregnancy" Children's Hospital Medical Center, Postgraduate Pediatrics course		Children's Hospital Medical Center, May.

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|--------|--|------|---|
| 1974   | "Rape Crisis Intervention", Massachusetts Mental Health Center, 1974   | 1974 | "Treatment of Sexual Dysfunction, New England Medical Center Dept. of Psych., Tufts University  |
| 1974   | "Adolescent Development", Childrens Hospital Medical Center Postgraduate Pediatrics course   | 1975 | "Treatment of Sexual Dysfunction" Peter Bent Brigham Hospital, Grand Rounds   |
| 1974,5 | "Sexual Dysfunction" Mass. General Hospital  | 1975 | "Rape" Boston Veteran's Hospital, Outpatient Clinic   |
| 1974   | "Couples therapy" Medfield State Hospital  | 1975 | "Women in Therapy" Massachusetts Mental Health Center   |
| 1974   | "Problems in Adolescent Sexuality", Boston State Hospital  | 1975 | "Abortion, A Focus on Teenage Pregnancy", "Teenage Sexuality", Postgraduate Obstetric-Pediatric Seminar, Ft. Lauderdale, Florida, August 1975.  |
| 1973   | "Couples Therapy" Medfield State Hospital  | 1975 | "Issues in Mental Health" Harvard Office of Career Development  |
| 1974   | "Psychology of Pregnancy, "Psychosocial Consideration-Medical Care Delivery", "Psychological Issues - Women in Psychiatry" Case Western Reserve University   | 1975 | "The Best Interests of the Child: The Legal and Psychiatric Interface of Child placement and Custody" - Child Psychiatry Service, New England Medical Center Hospital and Tufts University School of Medicine |
| 1974   | Clinical Considerations Related to Sex Stereotyping and Mental Health Interdisciplinary Colloquium - Boston University School of Social Work, Tufts New England Medical Center Department of Psychiatry, McLean Hospital | 1975 | "The Rape Victim" Boston College School of Nursing  |
| 1974   | "Rape Crisis Intervention" School of Public Health, University of North Carolina, Chapel Hill North Carolina   | 1975 | "Treatment of Sexual Dysfunction" Academic Rounds, Dept. of Psychiatry, Boston University, School of Medicine   |

1975	"Teenage Sexuality" Mass. Mental Health Center	1975	"Sexual Dysfunction" Norfolk Mental Health Center
1975	"The Rape Victim: Psychodynamic Considerations" with M. Notman, M.D., Am. Psychiatric Assoc., Anaheim Calif. 1975	1976,77	"Human Sexuality" McLean Hospital, Board Review Course
1975	"Women in Academic Psychiatry" Am. Psychiatric Assoc., Anaheim Calif., May 1975	1976	"Women and Psychotherapy" Departmemt of Psychiatry, Tufts University Medical School
1975	"Psychodynamic and Cognitive Aspects of Adolescence" with M. Notman, M.D., M. Bennett, M.D., J. Stein, Ed.D., Am. Psych. Assoc., Anaheim Calif., May 1975	1976	"Psychodynamic Issues in Rape" Department of Psychiatry, University of Colorado Medical School; Boston V.A. Hospital; Departments of Medicine and Psychiatry, Cambridge Hospital
1975	"Clinical Considerations: The Successful Woman" Boston University School of Social Work	1976	"Human Sexuality" Brookline Mental Health Assn.
1975	"Dilemmas of Suburban Living: Family Stresses" Centennial Symposium, Wellesley College, May 1975	1976	"Changing Role of Women in Mental Health" Children's Hospital Medical Center
1975	"Self Image of Women Health Care Professionals", with M. Notman, M.D. Joint Committee on the Status of Women, Harvard Medical School, School of Dental Medicine and School of Public Health.	1976	"Sexuality and Aging" Boston University Medical Center
1975	"Pregnancy and Motherhood" Primary Care Training Program, Boston City Hospital	1976,77	"Psychological Development of Adolescents" Rape in Children and Adolescents" Postgraduate Course in Adolescent Medicine, Harvard Medical School and Children's Hospital Medical Center
		1976	"Women in Management" John F. Kennedy School of Government - Harvard University
		1976	"Marital Therapy" Family Counseling Service, Inc.

- 1976 "Teenage Sexuality: Motivational Aspects in Contraception and Abortion: Postgraduate Course in Human Sexuality, Harvard Medical School and Beth Israel Hospital
- 1976 "Has Feminism Charged Psychoanalysis?" Amer. Academy of Psychoanal., Miami Beach, May, 1976
- 1976 "Women in Medicine and Psychiatry" Dept. Health, Education and Welfare, Boston
- 1976 "Women and Achievement", Association of Junior Leagues, Inc.
- 1976 "Sexuality" Harvard School of Public Health
- 1976 "Women and Achievement", Harvard School of Public Health
- 1976 "Therapy of Sexual Dysfunction" Northeastern Society for Group Psychotherapy
- 1976 "The Sexually Abused Child" Amer. Acad. of Pediatrics, Mass. Chapter
- 1976 "Early Clinical Experience in Behavioral Science Teaching" "Conflicts in Identity and Self Esteem for Women" "Sexual Activity with the
- 1976 "Psychiatrist: Ethical Problems in a District Branch Dilemma" Presented: Annual Meeting, Amer. Psych. Assn., Miami Beach, May, 1976.
- 1976 "Achievement Conflict in Women: Psychotherapeutic Considerations" Presented at the International Conference for Medical Psychotherapy, Paris, France, July, 1976
- 1976 "Sexual Dysfunction", Framingham Mental Health Association and Grand Rounds, Framingham Union Hospital, Framingham, MA
- 1976 Visiting Professor, University of Vermont Medical School, Department of Psychiatry, "Incest", Burlington, Vermont.
- 1976 "Sexual Dysfunction" American Association of Family Practice, Boston, MA
- 1976 "Sexual Dysfunction", McLean Hospital
- 1976 "Problems of Women Physicians" American Association of Medical Colleges
- 1977 "Treatment of Sexual Dysfunction", Boston University Health Services, Boston, MA

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|------|---|---------|--|
| 1977 | "Adolescent Development", Moses Brown School, Providence, RI  | 1977    | "Considerations of Female Aggression", Washington Psychiatric Association, Washington, D.C.                                    |
| 1977 | "The Role of the Psychiatrist in Obstetric-Gynecology Liaison", American College of Psychiatry, Atlanta, GA                         | 1977    | "Women in Health Care", Harvard School of Public Health.   |
| 1977 | "The Use of Groups in Teaching Adolescents", N.E. Society of Group Psychotherapy.   | 1976,77 | Course - "Teaching the Psychiatric Resident to be a Psychiatric Educator." American Psychiatric Association Meetings, Toronto. |
| 1977 | "Sexual Dysfunction", Human Resources Institute, Boston, MA   | 1977    | "Achievement Conflict in Women - Therapeutic Considerations." American Psychiatric Association, Toronto, Ontario, Canada.      |
| 1977 | "Management of the Pregnant Adolescent", Department of Pediatrics, New England Medical Center, Boston, MA                           | 1977    | "Socialization as Part of the Treatment Process." American Psychiatric Association, Toronto.                                   |
| 1977 | "Pregnancy as a Developmental Phase", Family Practice Program, Boston City Hospital.  | 1977    | "Women as Gynecological Patients: Changing Considerations of Reproduction", American Psychiatric Association, Toronto.         |
| 1977 | "Sexual Dysfunction", Primary Care Seminar, Harvard School of Public Health.  | 1977    | "Education for the Sex Educator", Boston University, Department of Continuing Education, Boston.                               |
| 1977 | "Achievement Conflict in Women", Michigan Psychiatric Society, Ann Arbor.   | 1977    | "Should a Woman be More Like a Man?" Bowdoin College, Brunswick, Maine.  |
| 1977 | "The Development of Aggression in the Female", Michigan Psychiatric Society, Ann Arbor; Michigan Psychoanalytic Society, Ann Arbor. |         |  |

1977 "Psychoanalytic Approach to Marital Therapy", Butler Hospital Annual Spring Symposium, Providence, Rhode Island.

COMMUNITY ACTIVITIES

1969-71 Board of Directors, Pregnancy Counselling Service  
1970 Subcommittee on Day Care, Harvard Area Planning Commission  
1970-71 President, The Children's Center, Inc.  
1971 Steering Committee for Day Care, Harvard University  
1971 Chairman, Nominating Committee, Pregnancy Counselling Service  
1971-74 Governor's Commission on the Status of Women: Chairman Health Task Force  
1971-74 Vice President, Pregnancy Counselling Service  
1971-73 Board of Directors, The Children's Center, Inc.  
1971 Planned Parenthood and Planned Parenthood Physicians--Speaker's Bureau  
1971 League of Women Voters--Speaker's Bureau  
1972 Editorial Advisor, "Women's Yellow Pages"

1972-74 Medical Advisory Committee, Pregnancy Counselling Service  
1972-73 Advisory Board, Society of Health and Human values of the Board of Christian Education  
1972-74 Policy and Planning Committee, Pregnancy Counselling Service  
1973 Advisory Board--Children's Center, Inc.  
1974 Advisory Board Day Care Planning Harvard Medical area  
1974 Advisory Board Governors Commission on the Status of Women  
1975 Advisory Board, Schlesinger Library, Radcliffe College  
1975 Consultant, Preterm, Inc.  
1974 to present Who's Who of American Women  
1974,5,6 Who's Who in the United States  
1974,5,6 Dictionary of International Biography

[Letterhead omitted in printing]

September 1, 1976

CURRICULUM VITAE

Sprague W. Hazard

Charles V. Chapin Hospital,  
Providence, R.I.

Communicable Diseases -  
1/1/46 to 6/30/46

Children's Hospital, Boston, Mass.  
Pediatric Pathology and  
Medicine - 7/1/46 to 12/31/48

Birth:

Newport, Rhode Island - December  
13, 1915

Military:

Medical Corps, U.S. Navy -  
10/15/42 to 3/23/46  
Discharged as Lt. Cmdr. - U.S.N.R.

Education:

University of Rhode Island - B.S.  
1937  
Columbia University - M.D. 1941

Professional Societies and

Appointments:

Massachusetts Medical Society  
American Board of Pediatrics - 1950  
American Academy of Pediatrics  
New England Pediatric Society  
Society for Adolescent Medicine  
American College Health  
Association - 1965-75

Training:

Newark City Hospital, Newark, N.J.  
Rotating Internship -  
10/15/41 to 10/15/42

New England College Health  
Association - President  
1971-72

Clinical Instructor in Pediatrics,  
Harvard Medical School  
Senior Associate Physician,  
Children's Hospital Medical  
Ctr.

President Medical Staff,  
Children's Hospital Medical  
Ctr. - 1970-72.

**Practice:**

Private Practice - Pediatrics,  
Needham, Mass. - 1/1/49 until  
7/1/65

**Previous Occupation:**

Director, University Health  
Services - 1965-75  
Brandeis University, Waltham, Mass.

**Present Occupation:**

\* Director of Health Service and  
School Physician  
Bement School  
Deerfield Academy  
Eaglebrook School  
Stoneleigh-Burnham School

**Community and Professional Activities:**

American Academy of Pediatrics -  
Massachusetts Chapter  
Chairman, Committee on Mental  
Health, 1959-65  
Chapter Chairman, 1966-70  
Chapter Executive Committee,  
1970 -  
Consultant, Operation Head  
Start, 1965-75

District Organization  
Alternate District Chairman,  
1970-74  
District Chairman, 1974 -

National Organization

Committee on Youth, 1965-74 -  
Chairman, 1970-74  
Council on Child Health, 1970 -  
Section on Child Development,  
1964  
Ad Hoc Committee on Continuing  
Education in Psycho-social  
Pediatrics, 1966-69  
Member of Executive Board, 1974-

Massachusetts Medical Society

Committee on Mental Health,  
1968-72  
Committee on Student Health,  
1973 -

Associations for Mental Health

Massachusetts  
First Vice-President, 1959-65  
Professional Advisory Committee,  
1962-65  
Board of Directors, 1965-74

National

Professional Advisory Council,  
1966-72  
Panel of Professional  
Consultants, 1972 -

United Community Services  
Health Council, 1965-69  
Board of Directors, 1969-73  
Health Technical Advisory  
Committee, 1969-74  
Chairman, Mental Health  
Planning Committee of  
Metropolitan Boston, 1965-68

Easter Seal Society

Professional Advisory  
Committee, 1971-73;  
Chairman, 1973-75  
House of Delegates, 1971-75  
Committee to Assist in the  
Education of the Handicapped,  
1972-74

Professional Advisory Council,  
National PTA Project on Children's  
Emotional Health, 1968-70

Massachusetts Fund for Children  
and Youth (an affiliate of the  
Massachusetts Committee on  
Children and Youth), 1974-

[Excerpted from 51 Pediatrics at 293]

AMERICAN ACADEMY OF PEDIATRICS  
COMMITTEE ON YOUTH

A MODEL ACT PROVIDING FOR CONSENT  
OF MINORS FOR HEALTH SERVICES

PREFATORY NOTE\*

Home:

Deerfield, Mass., 01342 -  
413/772-0698

Wife - Nancy Ann Hazard  
Children - Sprague William  
Robert Warren  
Duncan Rowland  
Sharon Lee  
Brian Carter  
Mara Lynn

[The following text was italicized  
in its original form]

This Model Act is drafted with the  
purpose of stimulating all states of

---

\* This Model Act has been approved by  
the Council on Child Health of the  
Academy. It is recommended for  
enactment in all the states.

The statements presented herein do  
not preclude alternatives which may be  
more appropriate, taking into account  
local situations and all other  
relevant facts.

Office:

Deerfield Academy      413/772-0241  
Deerfield, Mass. 03142

the union to review their statutes in regard to minors' consent for health services. It intends to be all inclusive to give the individual state the option to adopt part or all of this Act whenever it sees fit.

In a democratic nation such as ours, individuals' rights are paramount. In order for everyone, including minors, to have the right of obtaining health services, the balance of this right against others becomes of the utmost importance. This Model Act accepts the concept that getting health services is a basic right. Also, it accepts that parents have their basic right of protecting and promoting the health and welfare of their minors. Therefore, this Act is a compromise and a balance of these two basic rights in the conditions specified. The goal of this Act is to insure that all minors can have quality health services by granting

the minors self-consent in conditions and instances that will prevent them from seeking services if parental consent is required and by encouraging health professionals to deliver quality services to minors without incurring legal liability. Reasonable safeguards and limitations are stipulated in this Act to protect the minors' safety and the right of the parent. This Act also emphasizes the promotion of family harmony and minor's maturity. [End of italicized text.]

WHEREAS, certain minors are not obtaining adequate medical, dental, or other health care due to current legal and medical obstacles.

Whereas, providers of medical, dental, and other health care are now vulnerable to legal action for giving care to minors,

- Whereas, there is a need for coordination, stimulation, and support of access to medical, dental, and other health care for certain minors in need of such care without violating the rights of parents to protect and promote their minors' health,

Be It Enacted by the Legislature of the State of -----, as follows:

Section 1. For the purposes of this act:

(1) "Minor" means any person under the age of majority as defined by the State statute or under 18 years of age, whichever is lower;

(2) "Health Professional" means state licensed physician, psychologist, dentist, osteopathic physician, nurse, and other licensed health practitioner;

(3) "Health Services" means health services specified by the state, appropriately delivered by

different health professionals including examination, preventive and curative treatment, operation, hospitalization (admission or discharge), giving or receiving blood and blood derivatives, receiving organ transplantation, pledging donation of organs after death, the use of anesthetics, and receiving contraceptive advice and devices;

(4) The masculine shall include the feminine.

Section 2. Any person who reaches the age of majority or 18 years of age or is on active duty with or has served in any branch of the Armed Forces of the United States shall be considered an adult in so far as the consent for health services is concerned.

Section 3. Notwithstanding any other provision of law, the following minors may give consent to health professionals for health services:

(1) Any minor who is or was ever married, or has had a child, or graduated from high school, or is emancipated; or

(2) Any minor who has been separated from his parent, parents, or legal guardian for whatever reason and is supporting himself by whatever means; or

(3) Any minor who professes or is found to be pregnant, or afflicted with any reportable communicable disease including venereal disease, or drug and substance abuse including alcohol and nicotine. This self-consent only applies to the prevention, diagnosis, and treatment of those conditions specified in this subsection. The self-consent in the case of pregnancy, venereal disease, and drug and substance abuse also obliges the health professional, if he accepts the responsibility as the

provider of the health service, to counsel the minor by himself or by referral to another health professional for counselling.

The health professional may, but shall not be obliged to inform the parent, parents, or legal guardian of the minor of any treatment given or needed when:

(a) in the judgment of the health professional severe complications are present or anticipated; or

(b) major surgery or prolonged hospitalization is needed; or

(c) failure to inform the parent, parents, or legal guardian would seriously jeopardize the safety and health of the minor patient, younger siblings, or the public; or

(d) to inform them would benefit the minor's physical and mental health and family harmony.

Such information shall be given to the minor's parent, parents, or legal guardian only when the minor consents or when because of the minor's age or condition the attending health professional can reasonably presume such consent.

Notification or disclosure to the spouse, parent, parents, or legal guardian by the health professional shall not constitute libel or slander, a violation of the right of privacy, a violation of the rule of privileged communication or any other legal basis of liability. When the minor is found not to be pregnant, or not afflicted with venereal disease, or not suffering from a drug or substance abuse, including alcohol and nicotine, then no information with respect to any appointment, examination, test, or other health procedure shall be given to the parent, parents, or legal

guardian, if they have not been already informed as permitted in this Act, without the consent of the minor.

(4) Any minor who has physical or emotional problems and is capable of making rational decisions, and whose relationship with his parents or legal guardian is in such a state that by informing them the minor will fail to seek initial or future help. After the professional establishes his rapport with the minor, then he may inform the parent, parents, or legal guardian unless such action will jeopardize the life of the patient or the favorable result of the treatment; or

(5) Any minor who needs emergency care, including transfusions, without which his health will be jeopardized. The parent, parents, or legal guardian shall be informed as soon as practical except in conditions mentioned in subsections 1, 2, 3, or 4 of this section; or

(6) Any minor who has had a child may give effective consent to health service for his child; or

(7) Any minor may give consent for health care for his spouse if his spouse is unable to give consent by reason of physical or mental incapacity.

Section 4. No consent of anyone else including parent, parents, custodian, legal guardian, or any court shall be required for any person mentioned in Section 3 except where specified. Consent of the minor shall not be subject to later disaffirmance or revocation because of minority. The spouse, parent, parents, or legal guardian shall not be liable for payment for such service unless the spouse, parent, parents, or legal guardian have expressly agreed to pay for such care. The minor so consenting for such health services

shall thereby assume financial responsibility for the cost of said services except those who are proven unable to pay and who receive the services in public institutions.

Section 5. If major surgery, general anesthesia, or a life-threatening procedure has to be undertaken on a minor with his consent, it shall be necessary for the physician to obtain approval from another physician for the management except in an emergency in a community where it is impossible for the surgeon to contact any other physician within a reasonable time for the purpose of concurrence.

Section 6. Self-consent of minors shall not apply to sterilization or abortion.

Section 7. No consent shall be required of any minor who does not possess the mental capacity or who has a physical disability which renders

him incapable of giving his consent and who has no known relatives or legal guardians if two physicians agree on the health service to be given.

Section 8. Except by specific legal requirement, no information in regard to venereal disease, drug and substance abuse, pregnancy, and emotional illness shall be given by the health professional to another professional, school, law enforcement official, court authority, government agent, spouse, future spouse, employer, or any other person without the consent of the minor, unless giving the information is necessary to the health of the minor and the public and only when the minor's identity is kept confidential.

Section 9. The consent of the minor who represents that he may give effective consent under this Act for the purpose of receiving health

services but who may not in fact do so, shall be deemed effective for the purposes of prevention, diagnosis, and treatment required without the consent of the minor's parent, parents, or legal guardian if the person rendering the service relied in good faith upon the representation of the minor.

Section 10. Any health professional may render or attempt to render emergency service or first aid, medical, surgical, dental, or psychiatric treatment without compensation to any injured person or any person regardless of age who is in need of immediate health care when in good faith, the professional believes that the giving of aid is the only alternative to probable death or serious physical or mental damage. For major surgery or any dangerous procedures concurrence of another physician shall, if practical, be obtained.

Section 11. Any health professional may render nonemergency services to minors for conditions which will endanger the health or life of the minor if services would be delayed by obtaining consent from spouse, parent, parents, or legal guardian.

Section 12. Any minor who is examined, treated, hospitalized, or receives health services under this Act may give legal consent, and no person who administers such health services shall be liable civilly or criminally for assault, battery, or assault and battery, or any other legal charge, except for negligence or intentional harm, for treating such minor without advising his parent, parents, or legal guardian.

Section 13. In the event of emergency, either parent or legal guardian may authorize by writing or by telephonic communication with a

witness any adult to give consent for a minor who himself is unable to give self-consent for health care for whatever reason.

Section 14. Nothing in this Act shall require any health professional to provide service, nor shall any health professional be liable for such refusal.

Section 15. The Governor shall appoint an Advisory Committee that shall have the responsibility of promoting and encouraging the availability of health services for minors; shall conduct and develop resources of payment, private or public, for the rendering of such services; and shall recommend regulations to carry out the conditions and purposes of this Act.

Section 16. In the event any section, sentence, clause, or provision of this Act shall be declared invalid by any court of

competent jurisdiction, such action shall not affect the validity of the remaining sections, sentences, clauses, or provisions of this Act which shall continue effective.

Section 17. This Act shall become effective immediately upon passage and approval of the Governor.

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APPENDIX

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

Civil Action No. 74-4992-F

WILLIAM BAIRD; MARY MOE; PARENTS AID SOCIETY, INC.; GERALD ZUPNICK, M.D.; and all others similarly situated,

PLAINTIFFS,

v.

FRANCIS BELLOTTI, Attorney General of the Commonwealth of Massachusetts; GARRETT BYRNE, District Attorney of the County of Suffolk; the District Attorneys for all other Counties, their agents, successors, those acting in concert with them, and all others similarly situated,

DEFENDANTS,

JANE HUNERWADEL,

DEFENDANT-INTERVENOR.

Before ALDRICH, *Senior Circuit Judge*,  
JULIAN, *Senior District Judge*  
and FREEDMAN, *District Judge*.

OPINION

April 28, 1975

ALDRICH, *Senior Circuit Judge*. This is an action, brought as a class action, to enjoin, as unconstitutional on its face, the enforcement of a Massachusetts statute, Mass. G.L. c. 112, § 12P, enacted to take effect November 1, 1974, by Mass. Acts 1974, c. 706. The statute makes it a criminal offense to perform an abortion upon a minor without the consent of both parents as well as that of the minor, with certain exceptions, the most important being that the

parents' refusal may be overruled by a superior court judge "for good cause shown." The pertinent paragraph reads as follows:

"Section 12P(1). If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother."

*Standing.*

Plaintiffs are William Baird; Mary Moe I, hereinafter Mary Moe;<sup>1</sup> Parents Aid Society, Inc., hereinafter Parents Aid, and Gerald Zupnick. Defendants are Francis Bellotti, Attorney General of the Commonwealth;<sup>2</sup> Garrett Byrne, district attorney for the County of Suffolk, and the district attorneys of all other counties in Massachusetts. Intervening defendants are Kathleen Roth *et al.*, whom we permitted to intervene on behalf of, and as representative of, Massachusetts parents having unmarried minor daughters who are, or who might become,<sup>3</sup> pregnant. No evidence or stipulation was introduced as to any intervenors except Jane Hunerwadel. To be consistent, n. 1, ante, we must dismiss as to all the others. Mrs. Hunerwadel has three minor daughters, one in her teens, none pregnant as far as she knows. Like defendants, she does not know the identity of Mary Moe, and represents her only in the

<sup>1</sup> Three other Mary Moes were named, but no evidence supporting their standing was introduced, and we dismiss as to them for want of proof.

<sup>2</sup> Replacing Robert Quinn, the incumbent at the time this action was brought.

<sup>3</sup> Plaintiffs object to the latter's standing, citing Mr. and Mrs. Doe in *Roe v. Wade*, 1973, 410 U.S. 113, 128. We think the situation distinguishable.

general sense that she may represent parents of all nubile minor females in Massachusetts who may, in their opinion unwisely or improperly, wish to have an abortion without informing them.

Plaintiff Mary Moe is an unmarried minor residing at home with her parents in Massachusetts. At the time of the institution of the action she was 16 years of age and about 8 weeks pregnant.<sup>4</sup> She has not informed her parents of her condition, and does not wish to. Her father had told her, in connection with the pregnancy of a contemporary friend, that if that happened to her he would evict her and kill her boy friend. She did not know how far to believe this, except that she felt certain he would take some physical action against the boy. The boy, also 16, was a three-months acquaintance with whom she is no longer associating. Her relations with and affection for her family are "average good." There was no sexual instruction, no one caring to initiate the subject. There is no religious factor. She knew vaguely about contraception, but had no access to materials, and "didn't care to wait until [she] was 18." Her reasons for not informing her parents were in part apprehension of what might happen to her as a result of their learning she had had intercourse, in part the fear of what would happen to her boy friend, and in part the desire to spare her parents' feelings. She did confide in her older sister. Pregnancy would not have kept her from attending school.<sup>5</sup>

<sup>4</sup> Mary Moe has since had an abortion, performed by Dr. Zupnick following a restraining order issued in this case suspending the operation of the statute. It is not suggested that this moots the action as to her. *Roe v. Wade*, ante, 410 U.S. at 125.

<sup>5</sup> Defendants contend that the court should have appointed a guardian ad litem for Mary Moe, citing F.R.Civ.P. (17c). We do not do so. *Fatima Foe v. Vanderhoof*, D.Colo., 2/5/75, \_\_\_ F.Supp. \_\_\_. In connection therewith we make the following findings. Mary Moe is of ample intelligence to, and in fact does, fully understand the nature of this action and has voluntarily participated therein. Her

In connection with Mary Moe's capacity to represent a plaintiff class, F.R.Civ.P. 23(a)(4), we find, following examination and cross-examination in camera, that she is of average intelligence and awareness; that her emotional age at least corresponds with her chronological age, and that she had made a considered decision, before she learned of her pregnancy, that in case of pregnancy she would seek to abort, and that she was competent to make and effectuate that decision. If relevant, she did not learn of the other plaintiffs until someone else had determined that she was pregnant. We find that she is fairly representative of a substantial class of unmarried minors in Massachusetts who have adequate capacity to give a valid and informed consent, and who do not wish to involve their parents. This, of course, requires standing, but there can be no question of Mary Moe's standing to bring this action. Though the statute does not in terms subject her to criminal liability, its enforcement<sup>6</sup> would prevent her, absent violation by someone, from obtaining an abortion without compliance with its terms. Thus, she exhibits "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues," *Baker v. Carr*, 1962, 369 U.S. 186, 204,

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interests in the facial interpretation of and effect of the statute are fully represented by her competent counsel, and to the extent that there may be thought to be any conflicting interests, by the action of competent counsel for the intervening parent. Finally, we observe, although we do not make it a basis for our decision, that insofar as we look to state law, cf. *Marshall v. Mulrenin*, 1 Cir., 1974, 508 F.2d 39, the statute in question, which offers the minor a superior court hearing if her parents refuse their consent to an abortion, provides that the court need not appoint a guardian although in such instance no one at all may be representing her.

<sup>6</sup> Suit was brought shortly before the effective date of the statute and a restraining order was promptly issued. This order has since been continued without a separate hearing for a preliminary injunction with at least the tacit consent of the defendants, first because of their need for depositions, and thereafter because of scheduling difficulties with respect to their witnesses.

thereby demonstrating "a logical nexus . . . between the status asserted by the litigant and the claim [she] presents ...." *Flast v. Cohen*, 392 U.S. 83, 102. See *Roe v. Wade*, ante, 410 U.S. at 124, *Abele v. Markle*, 2 Cir., 1971, 452 F.2d 1121, 1125.<sup>7</sup>

Plaintiff William Baird is the founder and director of plaintiff Parents Aid. He describes himself as being, among other things, a pioneer and advocate for the free availability of abortions. He has a strong personal interest in that sense, but no financial or other tangible concern. But cf. *Sierra Club v. Morton*, 1972, 405 U.S. 727, 738; *Data Processing Service v. Camp*, 1970, 397 U.S. 150, 154. Baird claims standing because he wishes to assist Parents Aid, which allegedly, if the statute were in force, would make him an accessory. See *Griswold v. Connecticut*, 1965, 381 U.S. 479, 481. Arguably, this is too remote an interest to confer standing. If any citizen who might like to violate a law may contest it, the doctrine of standing would be meaningless. Cf. *Roe v. Wade*, ante, 410 U.S. at 128, and cases cited. On the other hand, Baird's contemplated activities are far less speculative than those there found insufficient. As director of Parents Aid, Baird for some time provided minors with abortion counseling and services, and the mere continuation of this activity, the mere preservation of the status quo, would subject him to criminal liability. Cf. *Griswold*, ante, 381 U.S. at 481; *Abele*, ante, 452 F.2d at 1125. In the light of the unassailable standing of other plaintiffs, however, see post, we do not pass on the question of Baird's standing.

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<sup>7</sup> We do not agree with defendants' insistence that in order to have standing Mary Moe must first exhaust the statutory conditions. Cf. *McNeese v. Board of Education*, 1963, 373 U.S. 668, 670-72. By this, apparently, they mean that she should have first informed her parents to seek their consent (and had it refused), one of the very requirements she contests. One does not have to comply with a statute in order to challenge its constitutionality.

Plaintiff Parents Aid is organized as a Massachusetts non-profit corporation. It provides, through its medical director and supporting personnel, abortions for varying fees, depending upon ability to pay. About 15% it performs without charge. The Society's standing is conferred not only by its direct subjection to criminal liability, but also by the recognition that even general enforcement of the statute against physicians alone would seriously interfere with its ongoing activities. *Doe v. Bolton*, 1973, 410 U.S. 179, 188; *Truax v. Raich*, 1915, 239 U.S. 33, 38-39.

Plaintiff Gerald Zupnick, a resident of New York, is a physician licensed in Massachusetts, and is Parents Aid's medical director. He works regularly at the latter's place of business two days a week, performing abortions on a fee basis. Dr. Zupnick's standing in this action is beyond question. The statute at issue applies directly to his activities, and although Dr. Zupnick was receiving a substantial income from performing these procedures, we credit his testimony that the threat of prosecution would force him to cease.

We find that Mary Moe, Parents Aid Society, Inc., and Gerald Zupnick have standing, as representative party plaintiffs, and Jane Hunerwadel as intervenor. From the standpoint of their being due and adequate class representatives, we find they have a strong personal interest and are competently and vigorously represented by legal counsel, and we certify this as a valid class action as to all.

Before leaving the question of standing we note that Parents Aid and Dr. Zupnick by hypothesis cannot lawfully, with exceptions too unusual for us to be concerned with, perform abortions upon minors incapable of consenting. Nonetheless, we hold that they do have standing to attack the statute as applied to all minors, at least insofar as it requires the consent of both parents. We find nothing about abortions that requires the minor's interest to be

treated differently from other medical and surgical procedures, as to which we find the custom to be to proceed on the consent of one parent.

#### *Controversy.*

Defendants contend that there is no "case or controversy" because none of the plaintiffs has been actively, or affirmatively, threatened with criminal proceedings. However, this is not the test. Plaintiffs need not act so as to precipitate their prosecution under a statute they wish to challenge as unconstitutional in order to constitute a case or controversy. Nor must they show that prosecution has been actively or verbally threatened in order to establish that the government's posture is adverse. See *Doe v. Bolton*, ante. 410 U.S. at 188. Rather, we must make a realistic appraisal of the total circumstances to determine whether the prospect of enforcement of the statute is "chimerical," *Steffel v. Thompson*, 1974, 415 U.S. 452, 459, or "concrete," *Aetna Life Ins. Co. v. Haworth*, 1937, 300 U.S. 227, 240. Cf. *Younger v. Harris*, 1971, 401 U.S. 37, 42; *Abele*, ante, 452 F.2d at 1125; *Acevedo Montalvo v. Hernandez Colon*, D.P.R., 1974, 377 F.Supp. 1332, 1334 (per curiam). We find that the subject of abortions has excited a great amount of feeling in Massachusetts; that the defendants, as is evident from their activities in this case, are satisfied that the statute is constitutional; that there will be extensive pressure upon them to prosecute in case of a violation, and that it is highly improbable that they would not immediately respond to such pressures. Baird testified that he had been arrested without warning in connection with the Massachusetts birth control statute, so-called, and we believe that public opposition to abortion is more organized and more vocal than was the opposition to birth control. Under all the circumstances we find that plaintiffs had every reason to believe that they had only

two alternatives, to continue their current activities and face immediate arrest, or to bring the present suit.

The "controversy" requirement, like the standing requirement, is to assure that there will be a vigorous contest with active participation on both sides by parties immediately interested, as distinguished from parties engaging in theoretical disputes as an intellectual pastime. See *Roe v. Wade*, ante, 410 U.S. at 123; *Golden v. Zwickler*, 1969, 394 U.S. 103, 108; *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 1941, 312 U.S. 270, 273. It is correspondingly requisite that the court's time not be wasted. We find that the present case fits the requirements in both respects, and hold that there is sufficient controversy.

#### *The Underlying Facts.*

We were offered nearly three days of testimony. The principal purpose, as we gather it, was to demonstrate on the one side the need, and on the other the objections; the interests served, and the interests countered, by the statute. In some areas there was considerable disagreement between the experts. We do not propose to resolve those disagreements. Even though in some instances our findings might not correspond with defendants' experts, we may accept their factual evidence for present purposes in cases of conflict because, either way, our ultimate conclusions would be the same. It is to be understood that throughout this opinion, unless the contrary is noted, we are talking about abortions during the first trimester.

There are presently three common methods of performing an abortion; injection of a saline solution; the so-called vacuum method, and a hysterotomy. The first two are performed under local anesthesia. The vacuum procedure, apparently the one generally performed by Dr. Zupnick, requires five to seven minutes. It is followed by minor bleeding and occasional pains, spanning perhaps three to

six weeks. There is a possibility of infection and other complications, as with any procedure, and there is a possibility, minor, or very remote, depending on whose testimony is accepted, of subsequent sterility. Plaintiffs' doctors, who had performed a very substantial number of first trimester abortions, gave a very low percentage of complications or "morbidity" in the case of lawful, as distinguished from illicitly performed abortions. Defendants' doctor's considerably higher figure we attribute to the fact that he does not do abortions as such, but only "terminates pregnancy" when there is already some medical necessity. Even he did not suggest any greater risks for minors than for adults.

In addition to such physiological risks, there are possible emotional risks. Abortion is commonly looked upon as offering "instant relief." In many cases this may be so, but in some it may be followed by various feelings of guilt. We also respect defendants' expert's view that it is undesirable to make too speedy a decision. At the same time we note his opinion that this decision, as the minor reaches the end of the first trimester, has great psychological as well as medical weight, and should be made as soon as possible.

All experts agreed that pregnancy in an unmarried minor is a period of great emotional stress; that support is needed, and that parental support, if forthcoming, is most desirable. Probably most parents are supportive. We are obliged to find, however, that an appreciable number are not, for a variety of reasons. Moreover, as may be the case with Mary Moe's father, parents may seek to control sexual behavior by threats that they do not mean, or would not carry out in the actual eventuality, but which nonetheless serve to destroy intercommunication.

We must find, however, that a significant number of minors who are capable of consenting are unwilling to tell

their parents, either because they correctly fear what would happen to themselves, or, although they would expect support from their parents in one sense, they know their parents would under no circumstances consent to the abortion they wish, or, because of their views on illegitimacy and the stigma attaching to unmarried mothers, would attempt to make them enter into a marriage they do not want.

There are also minors who, understandably, do not wish to have their parents know of their condition because of the distress that it would cause them, and the minor's own consequent feelings. While we shall not deal with this aspect further, we note that in a very real sense it precisely fits standard concepts of the right of privacy.

From the standpoint of parents, we believe that most would wish to know of their daughter's pregnancy, and we may assume that most would seek to be supportive. However, we cannot think that all would be. We accept the testimony of plaintiffs' experienced expert that some parents would insist upon the continuance of the pregnancy simply as a punishment, or to teach a lesson. We might find difficulty in regarding this reaction as other than unusual if we did not recall that the Commonwealth itself argued in *Baird v. Eisenstadt*, 1 Cir., 1970, 429 F.2d 1398, 1401, *aff'd*, 405 U.S. 438, that the prevention of fornication is so important that it justified withholding birth control devices from unmarried adults, with the resultant risk of pregnancy. The fact that the Court of Appeals expressed shock at this view does not mean it does not exist, but merely illustrates the degrees of variance and the strength of opinions on this subject.

Of unquestionable numerical importance, we cannot overlook the fact that many parents believe with total sincerity that abortion is morally impermissible, either under all circumstances or unless to save the life of the pregnant

woman. This leads to the significant contention pressed upon us by defendants as well as by intervenor, that some parents believe that they have separate rights as parents, and that there is a family interest, separate and apart from that of the minor. These interests, which are asserted to be of constitutional proportions, they variously describe as "parents' liberties;" the parents' right to "control," and their right to "promote and preserve the family as an important societal unit." These rights, being, by hypothesis, antithetical to the minor's, it may not be unnatural for the minor to feel that she is in trouble enough without having to become subservient to claims of others.

We have not stated all of the factual issues in this difficult area, but we believe we have stated enough to delineate the issues for present purposes. More facts will appear later when relevant.

#### *The Minor's Consent.*

The greatest divergence in the testimony related to the capacity of minors to give an informed consent.<sup>8</sup> At one extreme, Baird testified that in his many years experience he had never met a minor who was incapable, a conclusion supportable only on a hypothesis, which we reject, that an abortion, if not medically contra-indicated, is always the best solution, so that a minor who wants one must be presumed capable. We are also not impressed by the observation in *Washington v. Koome*, Wash., 1975, 530 P.2d 260, which recognized a 16-year old's consent, that "[t]he age of fertility provides a practical minimum age requirement for consent to abortion, reducing the need for

<sup>8</sup> We are not dealing in this case with legislation directed to the legal capacity of minors to consent to a medical or surgical procedure. Cf. *Younts v. St. Francis Hospital and School of Nursing, Inc.*, Kan., 1970, 469 P.2d 330, 336-38; *Smith v. Seibly*, Wash., 1967, 431 P.2d 719, 722-24. For reasons we shall come to, the statute goes far beyond such a principle.

a legal one." Fertility marks a physical, not emotional or intellectual maturity, and a "fertile" minor may become pregnant precisely because she lacks the capacity to reason and consent maturely. No expert testified that every minor of any age was able to make a considered decision.<sup>9</sup> Of necessity, there will be factual questions to weigh in each case.

Plaintiffs' experts were of the view that a majority of 16 and 17 year olds are capable. Defendants' experts, although they felt that essentially all are capable at 18, considered the 18th birthday a significant turning point, and would concede only a substantial minority at age 17. Whatever may be the value of conclusive presumptions making the 18th birthday a turning point for such matters as voting, the purchase of liquor, and entering into contracts other than certain contracts for necessaries, *cf. J. G. Pierce Co. v. Wallace*, 1925, 251 Mass. 383, we can attach no such factual magic to that birthday. We may also remark, parenthetically, that it is singular for the state to provide that a minor may consent to intercourse at age 16, Mass. G.L. c. 265, § 23 (statutory rape), but cannot consent to get rid of the product until she is two years older. But whichever experts are correct, it is enough for present purposes that we find that a substantial number of females under the age of 18 are capable of forming a valid consent. Our overall question, accordingly, is whether the state can be permitted to restrain the free exercise of that consent, to the extent that it has endeavored to do so.

We consider first what the statute does not do.

1. The statute does not purport to require simply that parents be notified and given an opportunity to communi-

<sup>9</sup> We find quite credible defendants' expert who testified that at certain periods of their lives adolescents might react maturely one day and immaturely the next.

cate with the minor, her chosen physician, or others. We mention this obvious fact because of the persistence of defendants and intervenors in arguing that the legislature could properly enact such a statute. Whether it could is not before us, and there is no reason for our considering it.

2. The statute does not exclude those capable of forming an intelligent consent, but applies to all minors. The statute's provision calling for the minor's own consent recognizes that at least some minors can consent, but the minor's consent must be supplemented in every case, either by the consent of both parents, or by a court order.

3. The statute does not purport simply to codify what we find to be accepted medical practice in Massachusetts hitherto, namely, that certain medical procedures involving minors require the consent of a parent. This statute creates a special, unique exception by requiring the consent of both parents.

4. The statute does not purport simply to provide a check on the validity of the minor's consent and the wisdom of her decision from the standpoint of her interests alone. Rather, it recognizes and provides rights in both parents, independent of, and hence potentially at variance with, her own personal interests. On being told by the court during argument that this appeared to be the statutory meaning, counsel agreed. It is the Commonwealth's position "that a parent in the decision-making process can consider interests other than the minor's. . . . The concept of liberty . . . embraces parental rights of supervision and control over children, and really what we are dealing with are competing rights of a constitutional dimension." Intervenor took the same position. We agree that this is the clear statutory intent. Whatever may be accorded to the minor by allowing her judicial review "for good cause shown," we do not regard it as meaning that the court should reverse a refusal of consent it finds reasonably made in the parent's interests.

5. As a corollary to the foregoing, the statute is not to be weighed in terms of permissible overbreadth, unavoidably applying to minors in fact capable of consenting because necessary for proper administration or enforcement with respect to minors considered incapable. The legislature made no such determination. Rather, the direct purpose is to encumber the rights of all minors facially coming within its terms.

We make this extensive analysis, which we take it all parties are in agreement with,<sup>10</sup> to demonstrate the two basic issues: the minor's personal rights, and the separate rights of the parents.

#### *The Minor's Rights.*

Passing for the moment the question whether there are conflicting rights, there can be no doubt but that a female's constitutional right to an abortion in the first trimester does not depend upon her calendar age. While the Court in *Roe v. Wade*, ante, 410 U.S. at 165 n.67, failed to pass upon whether there were any special rights in the state, or elsewhere, that could be of greater significance when the female is a minor, the Court in no way suggested that a minor lacked personal rights. "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone," *In re Gault*, 1967, 387 U.S. 1, 13; see *Coe v. Gerstein*, S.D.Fla., 1974, 376 F.Supp. 695, 698; *Merriken v. Cressman*, E.D.Pa., 1973, 364 F.Supp. 913, 918-19; *Washington v. Koome*, ante, 530 P.2d at 263; Note, the Minor's Right to Abortion and the Requirement of Parental Consent, 1974, 60 Va.L.Rev. 305, 316-19. Cf. *In re Winship*, 1970, 397 U.S. 358, 365; *Stull v. School Board of Western Jr.-Sr. High School*, 3 Cir., 1972, 459 F.2d 339, 345. We see no room

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<sup>10</sup> The dissent is seemingly of the opinion that a reviewing Superior Court judge would consider only the interests of the minor. We find no room in the statute for so limited an interpretation.

cannot be subordinated to the state any more than can be an adult's. We say this because, as previously pointed out, the statute is cast not in terms of protecting the minor, cf. *Ginsberg v. New York*, 1968, 390 U.S. 629, 638; *Prince v. Massachusetts*, 1944, 321 U.S. 158, 168, but in recognizing independent rights of parents. In this circumstance the statute does not attain validity vis-a-vis the minor by virtue of her ability (such as it is) to appeal to a Superior Court judge; this is merely a constraint on the assertion of unreasonable claims of her parents. The question comes, accordingly, do parents possess, apart from right to counsel and guide, competing rights of their own?

#### *The Competing Rights of Parents.*

The importance of the last-mentioned distinction is not to be overlooked. It is not to deny parents all rights if we invalidate this statute. As intervenor herself well illustrated, parents have years in which to teach their children, counsel them, and guide them. We may wonder how much would be accomplished by compulsorily affording a parent an eleventh hour opportunity, if adequate communication had not been established before. And we may wonder, also, whether imposing such burden on the minor would necessarily improve the family relationship. But this, as we have said, is not the statute's aim. The parents not only must be consulted, they are given a veto. Defendants do not like this word. The fact, however, that because of the right of appeal this veto may not be absolute, modifies it only to a degree. So long as parents' independent rights may be enforced, they remain formidable.

Except to assert that such rights exist, defendants and intervenor do little to demonstrate why parents should be granted individual rights independent of the minor's best interests. It is not they who have to bear the child. Once born, the minor, and not they, will be responsible for it

in all senses, financially and otherwise.<sup>11</sup> It is difficult to think of any self interest that a parent would have that compares with those significant interests of the pregnant minor.

Turning from discussion to decided authority, the cases cited by defendants and intervenor involving rights of parents uniformly concern situations where the parents' claimed rights are compatible with the minor's, not adverse. Such cases are of no assistance. Of course parents have rights in proper instances, to act in their children's interests. What is claimed here is something altogether different. But even if it should be found that parents may have rights of a Constitutional dimension vis-a-vis their child that are separate from the child's, we would find that in the present area the individual rights of the minor outweigh the rights of the parents, and must be protected. The single exception to this is *Planned Parenthood v. Danforth*, E.D.Mo., (1/31/75). We do not agree with the majority opinion.

Consequently, the parental consent requirement of Massachusetts General Laws, Chapter 112, Section 12P, is constitutionally invalid. Judgment will be entered permanently enjoining defendants from enforcing Chapter 112, Section 12P, as it relates to parental consent in any fashion. Plaintiffs to have their costs. Attorneys' fees against defendants are denied.

So ordered.

(s) BAILEY ALDRICH  
U. S. Circuit Judge

(s) FRANK H. FREEDMAN  
U. S. District Judge

<sup>11</sup> If we may take note of a comment made by a defender of such statutes on W. Buckley's *Firing Line*, Feb. 9, 1975, Southern Educational Communications Ass'n, Publisher, that having refused consent for an abortion the parents "assume a major responsibility to the infant who is going to be born," one may hope this would be so, but it would be naive not to envisage many exceptions. The statute places the burden of all exceptions on the minor.

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

Civil Action No. 74-4992-F

WILLIAM BAIRD; MARY MOE; PARENTS AID SOCIETY, INC.; GERALD ZUPNICK, M.D.; and all others similarly situated,

PLAINTIFFS,

v.

FRANCIS BELLOTTI, Attorney General of the Commonwealth of Massachusetts; GARRETT BYRNE, District Attorney of the County of Suffolk; the District Attorneys for all other Counties, their agents, successors, those acting in concert with them, and all others similarly situated,

DEFENDANTS,

JANE HUNERWADEL,  
DEFENDANT-INTERVENOR.

Before ALDRICH, Senior Circuit Judge,  
JULIAN, Senior District Judge,  
and FREEDMAN, District Judge.

DISSENTING OPINION  
April 28, 1975

JULIAN, S.D.J. (dissenting):

I disagree with the decision of the majority. I would hold that the challenged statute<sup>1</sup> is constitutionally valid.

<sup>1</sup> That statute, Mass. G.L. c. 112, § 12P, provides:

"(1) If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother.

"If one of the parents has died or has deserted his or her

It is also my opinion that in these proceedings the defendants and the parents of "Mary Moe," the 16-year-old plaintiff, have been deprived of their legal rights without due process of law.

I shall address the latter issue first.

The minor plaintiff in this case is an unemancipated, unmarried, high-school girl living with her parents and the rest of their family. At the time this action was brought she was pregnant and had been for about eight weeks. Within a matter of hours after the single judge issued a temporary restraining order enjoining the enforcement of the statute, Dr. Zupnick, a plaintiff, performed the

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family, consent by the remaining parent is sufficient. If both parents have died or have deserted their family, consent of the mother's guardian or other person having duties similar to a guardian, or any person who has assumed the care and custody of the mother is sufficient.

"(2) The commissioner of public health shall prescribe a written form for such consent. Such form shall be signed by the proper person or persons and given to the physician performing the abortion who shall maintain it in his permanent files.

"Nothing in this section shall be construed as abolishing or limiting any common law rights of any other person or persons relative to consent to the performance of an abortion for purposes of any civil action or any injunctive relief under section 12R."

If the written consent of the proper person or persons has not been delivered to the physician performing the abortion as set forth in § 12P, and if an emergency requiring immediate action does not exist, no abortion may be performed. Mass. G.L. c. 112, § 12N. Any person who willfully violates the provisions of § 12N shall be fined not less than \$100 nor more than \$2,000. Mass. G.L. c. 112, § 12Q. The statute also allows the attorney general or any person whose consent is required pursuant to § 12P or common law to petition the state's superior court for an order enjoining performance of an abortion that may be performed contrary to the provisions of c. 112, §§ I-Q. Mass. G.L. c. 112, § 12R.

*Roe v. Wade*, 410 U.S. 113 (1973), at 153-154, 163, requires that a woman who consents to an abortion must also obtain the consent of a physician. Mass. G.L. c. 112, § 12P, also requires an additional consent when a minor is to have the abortion—the consent of the minor's parents, and further provides that if the parents do not consent, the consent may be obtained by court order.

abortion on the girl. Her parents were not consulted. They have no knowledge of the girl's pregnancy or of the abortion. They have no knowledge of the pendency of this action. The majority of the Court denied defendants' motion that the parents be joined as parties to the action. The name "Mary Moe" is a fictitious name. She has withheld from her parents all information concerning her pregnancy and the abortion. She has been permitted by the Court to withhold her name and address and the names and address of her parents from the defendants as well as from the Court itself. The majority went further and ordered the defendants not to make any attempt to discover her identity or the identity of her parents.<sup>2</sup> The majority have thus made it impossible for the defendants to call the parents as witnesses at the trial or to take their depositions. The minor testified at the trial and the majority have made findings of material facts on the basis of her uncorroborated testimony. Some of the findings relate to the parents and reflect adversely upon their performance of their parental duties. The concealment of the identity of the parents precluded the defendants from rebutting the girl's testimony and from impeaching her credibility. They were also precluded from presenting evidence concerning the degree of maturity that the girl had attained<sup>3</sup> and the competence, fitness and willingness

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<sup>2</sup> Appropriate precautions to prevent public disclosure of the minor's identity would have sufficed. There was no need for the Court to suppress the disclosure of probable sources of relevant evidence.

<sup>3</sup> The majority find as a fact that "Mary Moe is of ample intelligence to, and in fact does, fully understand the nature of this action." The evidence before this Court is insufficient to justify such a finding. Plaintiff minor has not been shown by the evidence to possess a higher degree of intelligence than the average adolescent of her age. Based on the general experience of mankind, judicial notice may be taken that the average adolescent of sixteen does not "fully understand" the difficult substantive issues raised by this action.

of her parents to act as her guardians in this litigation and look after her best interests.<sup>4</sup>

Adjudication of this case significantly affects constitutional, statutory and common-law rights of the parents. "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Baldwin v. Hale*, 68 U.S. 223, 233 (1863), as quoted approvingly in *Goss v. Lopez*, 43 U.S.L.W. 4181, 4185 (U.S. Jan. 22, 1975).<sup>5</sup> Since the majority have made this a class action,<sup>6</sup> the temporary restraining order issued by a single judge and extended by the majority irreparably abridged not only the rights of the parents of plaintiff Mary Moe, but also the rights of the parents of all unmarried pregnant minors under the age of 18, that is, girls from about 12 years of age through 17, whose daughters have been aborted without any notice to the parents. The decision of the majority deprives the parents of their parental rights without notice or opportunity to be heard concerning the existence of those rights. These parents have thus been deprived of their parental rights without due process of law. *Roller v. Holly*, 176 U.S. 398 (1900); see *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 123 (1968); Federal Rules of Civil Procedure 12(b)(7), 19; 7 Wright & Miller, *Federal Practice and Procedure: Civil* § 1602 at 20 (1972). A decision entered in violation of the essential requirements of due

<sup>4</sup> The courts require a strong case to be made before they will interfere, or permit strangers to interfere, with the parents' guardianship. See, generally, "Readings in the History and System of the Common Law," Pound and Plucknett, 3d ed., 1927, at p. 496.

<sup>5</sup> *Roller v. Holly*, 176 U.S. 398, 409 (1900): "That a man is entitled to some notice before he can be deprived of his liberty or property, is an axiom of the law to which no citation of authority would give additional weight; . . . ."

<sup>6</sup> In my view, the majority have failed to comply with the requirements of Rule 23 of the Federal Rules of Civil Procedure relating to class actions.

process of law is void. *Bass v. Hoagland*, 172 F.2d 205, 209 (5 Cir.), cert. denied, 338 U.S. 816 (1949); *United States v. Manos*, 56 F.R.D. 655, 659 (S.D. Ohio, 1972); see *Roller v. Holly, supra*.

The majority have deprived the parents of the minor plaintiff of their parental rights without due process of law. The procedure followed in this case has also effectively deprived the defendants and intervenor of their right to call and examine witnesses before and during trial and to test the veracity of the minor plaintiff as a witness.

In addition to refusing to permit joinder of the parents as parties to this action, the majority have refused to appoint a guardian ad litem for the minor, thus leaving her without the protection of her natural guardians and of a court-appointed guardian.

The majority's stated reason for its failure to appoint a guardian ad litem for the minor is that

"Her interests in the facial interpretation of and effect of the statute are fully represented by her competent counsel, and to the extent that there may be thought to be any conflicting interests, by the action of competent counsel for the intervening parent."

Counsel for the plaintiffs was never appointed guardian ad litem for the minor plaintiff and never purported to act as her guardian. At no time before or during trial was he ever informed that he was guardian ad litem for the minor plaintiff. Except as to the issue of the constitutionality of the state statute, the record fails to disclose that counsel for the plaintiffs had the slightest concern for the welfare of the minor plaintiff. The record shows that his sole objective was to have the state statute declared unconstitutional for the benefit of the adult and corporate plaintiffs by eliminating it as a legal obstacle to the performance of abortions on minors under the age of 18. The Court should have appointed a guardian ad litem for the minor

plaintiff to ensure proper representation of her interests. See Federal Rules of Civil Procedure 17(c).

Counsel for the minor plaintiff and her "class" was also counsel for the other plaintiffs whose real interests conflicted with those of the minors. The plaintiffs other than the minors receive substantial income from the abortions performed on minors and thus have a financial interest in the outcome of this litigation. Parents Aid Society, Inc.,<sup>7</sup> receives fees for abortions which it shares with the abortionist, Zupnick.<sup>8</sup> Baird insists that he does not receive

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<sup>7</sup> On all the pertinent evidence it is more probable than not that Parents Aid Society, Inc., is Baird's alter ego.

<sup>8</sup> Zupnick lives in New York. He commutes to Boston to perform abortions on two days each week. The Boston abortions are not the full extent of his practice, however. Zupnick also performs abortions in New York two days each week. Zupnick's medical practice is limited to performance of first trimester abortions in facilities of Parents Aid Society, Inc., in Boston and New York. Zupnick is paid well, as his testimony shows:

"Q. Is there a maximum price for an abortion at Parents Aid Society?"

"A. Yes. The abortion fee is on a sliding scale from the patient's ability to pay to a maximum of \$150.

"Q. In the case where \$150 is charged, what do you receive in that instance?

"A. Usually a third.

"Judge Freedman: Is that paid on a monthly basis?

"The Witness: No. It is paid on a daily basis. I am given a check at the end of the day.

"Q. What was the amount of the last check that you received from the Parents Aid Society?

[An objection is stated and overruled]

"A. I honestly don't recall the exact figure. I believe it was in the area of \$600.

"Q. You have received checks higher than that amount?

"A. Higher and lower, yes.

"Q. Does that constitute reimbursement for two days work?

"A. That is correct.

\* \* \* \* \*

"Judge Freedman: I would be interested, Doctor, in the number of abortions you performed—the percentage of those that incorporate fees of the maximum \$150 as opposed to those that are actually free.

funds from Parents Aid Society, Inc.: "[N]ot one penny has come to me in eleven years." (December 31, 1974, Tr. p. 120). Baird's wife, however, receives funds from Parents Aid Society, Inc., in Baird's words: "because I was not earning enough money to feed her and the family." (*Id.*)

The plaintiffs, including the minor, were represented by the same counsel. Parents Aid Society, Inc., Zupnick, Baird, and Baird's wife and children, however, directly or indirectly, derive financial advantage from the abortions. The financial interests of those plaintiffs, however, are in conflict with the minor's "very real need . . . to have her own personal rights and interests protected." *Noe v. True*, 507 F.2d 9, 12 (6 Cir. 1974).

The interests of the minors in this litigation are of a different nature and far more important than the monetary interests of the other plaintiffs. They are in collision and should not have been represented by the same counsel. Advocacy on behalf of the minor should have sought to protect her from possible overreaching on the part of adults such as Baird or Zupnick. No consideration appears to have been given to the possibility that the abortion may have been adverse to her best interests. Counsel made

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"The Witness: As I said before, it is not always free or \$150. It is on a sliding scale basis. If you are asking me how many patients pay the total of \$150 fee—

"Judge Freedman: Yes. How many people pay no fee on a percentage basis?

"The Witness: I would say probably about two-thirds pay the \$150 fee and probably about 15% are done for free, and then there is a scale in between on the other patients....

\* \* \* \* \*

"Q. When the patient walks into the operating room, typically that is the first time she has met you?"

"A. Usually, yes.

"Judge Freedman: How long does the typical abortion procedure last?

"The Witness: The average technical part of the procedure is five to seven minutes."

(December 31, 1974, Tr. pp. 15-17, 28.)

no attempt to determine the emotional impact the abortion might have on her.

The interests of the minor plaintiff were not adequately represented. The Court should not have deprived the minor of the guidance, counsel and care that her parents were under a legal obligation to provide, and might have provided if her condition had not been concealed from them. If the parents had been informed and nevertheless had failed to act, the Court should have assumed the ultimate responsibility for any determination made on behalf of the minor by appointing a guardian ad litem.<sup>9</sup> See *Noe v. True*, 507 F.2d 9, 11-12 (6 Cir. 1974).

The majority find that Mary Moe was competent to make and effectuate the decision to abort. The majority also find there are other unmarried pregnant minors in Massachusetts who have adequate capacity to give a valid and informed consent to an abortion. These findings are not warranted by the evidence.

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<sup>9</sup> In *Foe v. Vanderhoof*, Civ. A. No. 74-F-418 (D. Colo., Feb. 5, 1975), which is relied upon by the majority, the court did not appoint a guardian ad litem. The court found the emancipated minor plaintiff's interests were fully protected by her counsel and social worker. Counsel, however, did not represent conflicting interests. Moreover, the *Vanderhoof* court found that the plaintiff had met with her mother, doctor and social worker to discuss her pregnancy, abortion procedures and the consequences of the decision. The *Vanderhoof* court also appointed an obstetrician and a psychiatrist to examine and counsel the plaintiff. The appointed doctors agreed she should have an abortion. The *Vanderhoof* court thus assumed responsibility for determinations made on the minor's behalf. In contrast with the meticulous procedure in *Vanderhoof*, Mary Moe, for example, had perfunctory contact with the attorneys and abortionists. No professionals were appointed to examine or counsel her prior or subsequent to the issuance of the temporary restraining order or performance of the abortion. The majority's failure to take any precautions for the protection of the minor's best interests is particularly ironic since Mass. G.L. c. 112, § 12P, which the majority strike down, allows recourse to the state court when parental consent is denied. The state court would have been able to protect the minor's best interests as did the *Vanderhoof* court.

In order for consent to be informed, a minor must understand the emotional as well as the physical consequences which may follow from an abortion. The testimony of the psychiatrists is unanimous on this point. Tr. of testimony of Dr. Carol Nadelson, assistant professor of psychiatry at Harvard Medical School, December 30, 1974, pp. 118, 127-132; Tr. of testimony of Dr. Raymond C. Yerkes, child psychiatrist, Director of the Child Service at the Greater Lawrence Mental Health Center, January 28, 1975, pp. 50-52. No testimony was offered, however, concerning the emotional consequences the abortion may or will have upon Mary Moe. No testimony was presented concerning Mary Moe's understanding of those consequences or her ability to understand them. In making their findings the majority must necessarily have applied a test of informed consent which looks only to the minor's ability to understand the consent form, surgical procedure and direct physical effects. The majority disregard that aspect of informed consent which requires that a minor must understand the emotional consequences which may follow an abortion.

Parents have rights and responsibilities that inhere in the parent-child relationship and stem from the fact, nature and purpose of parenthood. These rights and responsibilities are not inimical to the minor's rights and welfare. They exist for the benefit of the child and protection during the child's formative years. The state has a compelling interest in protecting the parental rights and duties against unauthorized intrusion by third persons. The statute under attack expresses this compelling interest.

The liberty guaranteed by the Fourteenth Amendment "denotes . . . the right of the individual . . . to marry, establish a home and bring up children, . . ." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). The Constitution guarantees

"the liberty of parents and guardians to direct the upbringing and education of children under their control . . . The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."

*Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925). See *Roe v. Wade*, 410 U.S. 113, 152-153 (1973); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); see also *Weinberger v. Weisenfeld*, 43 U.S.L.W. 4393, 4398 (U.S. March 19, 1975). This right and duty of the parents to prepare the child for additional obligations "must be read to include the inculcation of moral standards, religious beliefs, and elements of good citizenship." *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972).

The Commonwealth of Massachusetts recognizes that a child benefits from parental guidance and protection and fully acknowledges the freedom and responsibility of parents to direct the upbringing of their children. *Commonwealth v. Brasher*, Mass. , 270 N.E.2d 389, 394 (1971).<sup>10</sup> Indeed, it is the articulated policy of Massachusetts to strengthen and encourage family life for the protection and care of the child. Mass. G.L. c. 28A, § 1; c. 119, § 1.

The question of the constitutionality of statutes requiring parental consent to the abortion has been explicitly left open in *Roe v. Wade*, 410 U.S. 113 (1973).<sup>11</sup> There is nothing in that opinion or in the opinion in the companion

<sup>10</sup> Mass. G.L. c. 112, § 12P, is one of many state statutes designed to protect the child from her own improvidence and from overreaching by adults by requiring parental consent as a prerequisite to the child's engaging in a specified activity. E.g., Mass. G.L. c. 131, § 14; c. 140, §§ 131, 179; c. 207, § 7; c. 208, § 30; c. 210, § 2; c. 248, § 35; c. 272, § 1.

<sup>11</sup> At page 165, n. 67, the Court stated: "We need not now decide whether provisions of this kind [provision requiring parental consent] are constitutional."

case of *Doe v. Bolton*, *id.*, at page 179, that abrogates or erodes the rights and responsibilities of parents. Those decisions do not remove the pregnant, unemancipated minor from the care and custody of her parents. The parents still remain her natural guardians with undiminished responsibility for her welfare.

The State parental consent statute protects an interest which is completely separate from the State's interest in the protection of the pregnant woman's health or the unborn child's life. The statute protects the right of the parents to the liberty guaranteed them by the Fifth and Fourteenth Amendments. The statute protects the family relationship, the right and duty of parents to bring up their child, the right and duty of parents to inculcate moral standards; the statute provides protection for the parents' right and duty to make reasonable decisions, in the first instance, for the control and proper functioning of the family as a harmonious unit. The statute ensures that parents will have the opportunity to guide and counsel their daughter, and play a supportive role during and after the pregnancy.<sup>12</sup>

<sup>12</sup> Mrs. Jean Hunerwadel, the intervenor, holds a B.S. in Early Childhood Education and Child Development from St. Joseph's College, West Hartford, Conn. She has worked at the James Jackson Putnam Children's Center Clinic for emotionally disturbed pre-school children and as a kindergarten teacher and director of a nursery school. Mrs. Hunerwadel's testimony concerning the role of parents is pertinent and helpful:

"Q. Now, I ask you this, Mrs. Hunerwadel, are there circumstances in which you would consent to an abortion to be performed on one of your daughters were she to be found to be pregnant, unmarried and under age 18?

"A. Yes, there are.

"Q. Tell us what those circumstances would be.

"A. We would like to understand the circumstances which led to her pregnancy, the circumstances in her life. We would like to know about the boy by whom she became pregnant, about her feelings about the pregnancy, her feelings about the baby, her feelings about the boy who would be the father of

The majority attack the statute because it requires the consent of both parents. Parental rights and duties, however, inhere in both parents by reason of their parenthood

the child. We would like to be able to make available to her our support and our interest and our care as we have from the time that we have known she was coming to us.

"We would like to be sure that she has available all of the alternatives that are available to her and all of the resources in the community, and we would like the opportunity to have her know that we will continue to support her, and if she should decide, in spite of what we were able to show to her in terms of alternatives and support and how we felt, that she just must have an abortion, we would consent to that; that that would not be the end of our involvement.

"We would also want to be sure that she had a gynecologist-obstetrician whom we felt was professionally skilled, and beyond that, who had the qualities of interest and sensitivity and humanitarianism which we regard to be important in physicians; and we would also want to be sure that the facility that was chosen in which the abortion were to be done, because we do not regard the situation of unplanned pregnancy to be a separate situation which is begun, ended and then is out of the youngster's life.

"We feel that the youngster, as everybody does, brings feelings of circumstances into the situation and that also circumstances and feelings continue after, whether it is a completed pregnancy or an abortion.

"And we would foresee needing follow-up care for this youngster, psychiatrically, probably, at some time if not immediately.

"So those kinds of decisions would be very important to us to help her to make."

(January 28, 1975, Transcript pp. 77-78.)

The testimony of each medical expert, whether called by the plaintiffs or defendants, establishes the validity of Mrs. Hunerwadel's position. While the experts differ concerning the necessity for parental consent, each indicated that parental involvement in the abortion decision is helpful, benefits the child, and should be encouraged. Tr. of testimony of Dr. Somers H. Sturgis, emeritus professor in gynecology at Harvard University, Dec. 7, 1974, p. 27, Dec. 30, 1974, pp. 5-6, 8-9, 19; Tr. of testimony of Dr. Jane E. Hodgson, associate professor of obstetrics and gynecology at the University of Minnesota, Dec. 7, 1974, pp. 66-67, Dec. 30, 1974, pp. 75-77, 80-81; Tr. of testimony of Dr. Carol Nadelson, assistant professor of psychiatry at Harvard Medical School, Dec. 30, 1974, pp. 115-116, 119-121, 130; Tr. of testimony of Dr. Jules Rivkind, chairman of the

and are guaranteed equally to both parents by the Constitution. The statute before us recognizes that one parent cannot lawfully usurp the rights and duties of the other, *Weinberger v. Weisenfeld*, 43 U.S.L.W. 4393, 4398 (U.S. March 19, 1975),<sup>13</sup> and requires the consent of both except as otherwise provided in the statute.

Minors, of course, possess constitutional rights. Constitutional rights, however, are not absolute. Their exercise may be made subject to reasonable conditions.<sup>14</sup> The constitutional right of an adult woman to have an abortion, for example, has been conditioned by the Supreme Court upon the concurrence of a physician in her decision. The purpose of the condition is to provide a safeguard against the possibility of a medically inadvisable decision. See *Roe v. Wade*, 410 U.S. at 153. With respect to minors, the power of the state to limit or regulate the exercise of constitutional rights has been recognized by the Supreme Court. In *Ginsberg v. New York*, 390 U.S. 629 (1968), the Court, at page 638, states:

"... [W]e have recognized that even where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults....' *Prince v. Massachusetts*, 321 U.S. 158, 170."

Department of Obstetrics and Gynecology at Mercy Hospital, Pittsburgh, Pa., Jan. 28, 1975, pp. 15-18; Tr. of testimony of Dr. Raymond C. Yerkes, child psychiatrist, Director of the Child Service at the Greater Lawrence Mental Health Center, Jan. 28, 1975, pp. 47-50, 63-64.

<sup>13</sup> At page 4398: "And a father, no less than a mother, has a constitutionally protected right to the 'companionship, care, custody, and management' of 'the children he has sired and raised, [which] undeniably warrants deference and, absent a powerful countervailing interest, protection.'"

<sup>14</sup> "We . . . conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation." *Roe v. Wade*, 410 U.S. 113, at 154.

See also *United States v. Bisceglia*, 43 U.S.L.W., 4242, 4243 (U.S. Feb. 19, 1975).

And again at page 639:

"The well-being of its children is of course a subject within the State's constitutional power to regulate, and, in our view, two interests justify the limitations in § 484-h upon the availability of sex material to minors under 17, at least if it was rational for the legislature to find that the minors' exposure to such material might be harmful. First of all, constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' *Prince v. Massachusetts*, supra, at 166."

I find, therefore, no conceivable constitutional objection to legislation providing in the case of a pregnant minor an additional condition designed to make certain that she receive parental or judicial guidance and counselling before having the abortion. The requirement of consent of both parents<sup>15</sup> ensures that both parents will provide counselling and guidance, each according to his or her best judgment. The statute expressly provides that the parents' refusal to consent is not final. The statute expressly gives the state courts the right to make a final determination. If the state courts find that the minor is mature enough

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<sup>15</sup> The majority speculate concerning possible interpretations of the "for good cause shown" language. There is also some doubt whether the statute requires consent of one or both parents. The construction of the statute is a matter of state law. If the majority believe the only constitutional infirmities arise from their interpretation of the statute, the majority should certify questions of state law to the Supreme Judicial Court of Massachusetts pursuant to Rule 3:21 of that court in order to receive a definitive interpretation of the statute. See *Hendrickson v. Sears*, 495 F.2d 513 (1 Cir. 1974).

to give an informed consent to the abortion and that she has been adequately informed about the nature of an abortion and its probable consequences to her, then we must assume that the courts will enter the necessary order permitting her to exercise her constitutional right to the abortion. There is no basis for a contrary assumption.<sup>16</sup> In the case of an adolescent girl who finds herself in an emotional crisis of this kind it is important to make certain that she receive guidance and support from her parents who normally, more than any other person, have the strongest natural interest in her welfare. In the event that the parents refuse their consent, guidance and support will be provided by the state court judge in his role of *parens patriae*. The requirement of parental consent makes it necessary that the parents be informed and consulted about the girl's serious problem. The girl's condition would not then be concealed from her parents as has been done in this case with the cooperation of this Court as though her parents, whom we do not know and have not heard, were her natural enemies and not her natural guardians.

Parental rights and duties are recognized and guaranteed by the Constitution as necessary to the welfare of the minor children themselves, as well as of the family of which they are a part. The state has a compelling interest in the protection of these parental rights and duties. The statute is necessary to protect this compelling interest and is narrowly drawn to do just this. The statute is constitutional. *Planned Parenthood v. Danforth*, Civ. No. 74-416 C(A) (E.D. Mo. 1975), enforcement stayed, 43 U.S.L.W. 3451 (U.S. Feb. 14, 1975). The statute before us is specifically designed to protect pregnant minors under 18 years of age against their own improvidence due to immaturity of judgment, and against overreaching by others.<sup>17</sup> The enactment

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<sup>16</sup> "Appellee is in truth urging us to base a rule on the assumption that state judges will not be faithful to their constitutional responsi-

of such a statute is a valid exercise of the state's police power and also of its power as *parens patriae*. *Ginsberg v. New York*, 390 U.S. 629 (1968); *Prince v. Massachusetts*, 321 U.S. 158 (1944).

The statute is a proper exercise of constitutional power by the Commonwealth of Massachusetts and is therefore valid. The decision of the majority deprives the defendants and the parents of the minor plaintiff of their legal rights without due process of law.

For these reasons I dissent from the decision of the majority.

(s) ANTHONY JULIAN  
U. S. Senior District Judge

COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT

William BAIRD et al.<sup>1</sup>

v.

ATTORNEY GENERAL et al.<sup>2</sup>

January 25, 1977.

Before HENNESSEY, C.J., and  
QUIRICO, BRAUCHER and WILKINS, JJ.

WILKINS, Justice.

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bilities. This we refuse to do." *Huffman v. Pursue, Ltd.*, 48 U.S.L.W. 4379, 4385 (U.S. March 18, 1975).

<sup>17</sup> Massachusetts, like other states, has many laws, both decisional and statutory, designed to protect minors from their own improvidence and from possible overreaching. See, e.g., *Commonwealth v. Nickerson*, 87 Mass. (5 Allen) 518 (1863); M.G.L. c. 10, § 29; c. 90, §§ 8, 8A, 8B, 10; c. 105, § 3-207; c. 119, c. 127, § 22; c. 128A, § 10; c. 131, § 14; c. 138, § 34; c. 140, §§ 122, 130, 131, 179, 198; c. 147, § 35; c. 149; c. 191, § 1; c. 207, §§ 7, 9, 24, 25; c. 208, § 30; c. 210, §§ 2, 5A; c. 248, § 35; c. 265, §§ 13B, 22A; 23, 24B; c. 269, §§ 12A, 12B; c. 270, § 6; c. 272, §§ 1, 4, 28, 35A, 58.

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<sup>1</sup> The plaintiffs are William Baird; Mary Moe, a pseudonymous unmarried minor residing in Massachusetts with

(Footnotes continued on page 2)

<sup>1</sup>her parents, who was pregnant at the time of the initiation of the action; Parents Aid Society, Inc., a Massachusetts non-profit corporation which, through its medical director and supporting personnel, provides abortions; and Dr. Gerald Zupnick, who is medical director of the corporation and performs abortions on a fee basis at the corporation's place of business two days a week.

<sup>2</sup> The defendants are the Attorney General of the Commonwealth and the several district attorneys in the Commonwealth. References to the defendants in this opinion do not include the intervening defendant (intervener) referred to subsequently.

[end of footnote]

We have before us a series of questions, certified to us by the United States District Court, District of Massachusetts, concerning various aspects of § 12P of G.L. c. 112, inserted by St.1974, c. 706, § 1, a section which sets forth certain conditions for the performance of an abortion on an unmarried minor. These questions have been certified to us on the prompting of the Supreme Court of the United States in Bellotti v. Baird, 428 U.S. 132, 151, 96 S. Ct. 2857, 2868, 49 L.Ed.2d 844 (1976). A brief statement of the process by which these questions have arrived here is appropriate.

In 1974 the Legislature adopted St.1974, c. 706, entitled "An Act to protect unborn children and maternal health within present constitutional limits." That act added several sections to c. 112 of the General Laws, including § 12P. Section 12P,

which is set forth in full in the margin,<sup>3</sup> is the principal target

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<sup>3</sup> "(1) If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother.

"If one of the parents has died or deserted his or her family, consent by the remaining parent is sufficient. If both parents have died or have deserted their family, consent of the mother's guardian or other person having duties similar to a guardian,

of a constitutional challenge which the plaintiffs addressed to the

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(footnote cont.)

<sup>3</sup> or any person who had assumed the care and custody of the mother is sufficient.

"(2) The commissioner of public health shall prescribe a written form for such consent. Such form shall be signed by the proper person or persons and given to the physician performing the abortion who shall maintain it in his permanent files.

"Nothing in this section shall be construed as abolishing or limiting any common law rights of any other person or persons relative to consent to the performance of an abortion for purposes of any civil action or any injunctive relief under section twelve R."

[end of footnote]

Federal District Court on October 30, 1974. That section requires parental or judicial approval before a nonemergency abortion may be performed on an unmarried minor. In April, 1975, in a two to one decision, the District Court held that the parental consent provisions of § 12P were constitutionally invalid and ordered the entry of a judgment permanently enjoining the Attorney General and the various district attorneys from enforcing § 12P, "as it relates to parental consent in any fashion." Baird v. Bellotti, 393 F. Supp. 847, 857 (D. Mass. 1975). The law enforcement officials appealed, as did an intervening defendant, Jane Hunerwadel, a parent of an unmarried minor female of childbearing age. In the Supreme Court, the intervener argued that the District Court should have certified questions concerning the construction of § 12P to this court, pursuant to S.J.C. Rule 3:21,

359 Mass. 790 (1971), and that the District Court should have abstained from resolving any constitutional question until this court had answered those questions and construed § 12P.

On July 1, 1976, the Supreme Court of the United States accepted the intervener's argument and vacated the judgment of the District Court, holding "that the District Court should have certified to the Supreme Judicial Court of Massachusetts appropriate questions concerning the meaning of § 12P and the procedure it imposes." Bellotti v. Baird, 428 U.S. at 151, 96 S. Ct. at 2868. The Supreme Court noted that its decision on the same day in Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 96 S. Ct. 2831, 49 L.Ed.2d 788 (1976), struck down a statute that created a parental veto over an unmarried minor's right to obtain an abortion. Id. at 75, 96 S. Ct. at 2844. In its

opinion in the case now before us the Supreme Court stated that the defendants argued that § 12P could be construed not to contain a parental veto, and that, although the statute prefers parental consultation and consent, it permits a mature minor capable of giving informed consent to obtain a court order permitting an abortion without parental consultation if the abortion would be in her best interests. Bellotti v. Baird, 428 U.S. at 145, 96 S. Ct. at 2865. On the other hand, the plaintiffs argued in the Supreme Court that the statute gave parents an unbridled veto. Id. at 146, 96 S. Ct. at 2865.

In deciding that abstention was appropriate here, the Supreme Court did not indicate that the statute would be constitutional if interpreted as the defendants urged, but merely concluded that the statute was susceptible to the defendants'

construction and that the nature of the problem would change materially if the defendants' statutory construction were adopted. "[I]n the absence of an authoritative construction, it is impossible to define precisely the constitutional questions presented." Id. at 148, 96 S. Ct. at 2866. That Court recognized that it could not determine then what this court's interpretation might be, "what factors are impermissible or at what point review of consent and good cause in the case of a minor becomes unduly burdensome." Id. at 148, 96 S. Ct. at 2866. The Supreme Court, "assume[d] that [this court] will do everything in its power to interpret the Act in conformity with its title: 'An Act to protect . . . within present constitutional limits.'" Id. at 148 n. 16, 96 S. Ct. at 2866 n. 16.

Before turning to the specific questions asked of us, we should analyze our function in interpreting § 12P. The Federal District Court has the fundamental obligation to determine the Federal constitutional issue. Our role is to construe the statute. But, traditionally, we have regarded the presence of a serious constitutional question under one interpretation of a statute to be a strong indication that a different possible interpretation of that statute should be adopted, if the constitutional issue can be avoided thereby. Worcester County Nat'l Bank v. Commissioner of Banks, 340 Mass. 695, 701, 166 N.E.2d 551 (1960). See First Nat'l Bank v. Attorney Gen., 362 Mass. 570, 595-596, 290 N.E.2d 526 (1972) (Quirico, Braucher, & Kaplan, JJ., concurring), and cases cited. We think the Supreme Court recognized that we might engage in a construction

of § 12P so as to avoid, or at least limit, any constitutional problem. We think it is clear as well that, from its title, the Legislature intended to pass an act which was constitutionally acceptable and, even more important, to save as much of the statute's purpose as it could if any explicit statutory provision could not survive constitutional attack. Statute 1974, c. 706, § 2, provides that "[i]f any section, subsection, sentence or clause of this act is held to be unconstitutional, such holding shall not affect the remaining portions of this act."

Our principal advice to the Federal District Court is that we would construe § 12P to preserve as much of the expressed legislative purpose as is constitutionally permissible. The fact that the Supreme Court has not yet defined the permissible scope, if any, of parental

involvement in an unmarried minor's decision to seek an abortion makes certain of our constructions of § 12P potentially infirm. If the Supreme Court concludes that we have impermissibly assigned a greater role to the parents than we should or that we have otherwise burdened the minor's choice unconstitutionally, we add as a general principle that we would have construed the statute to conform to that interpretation.

We should not be understood to say, however, that we are entirely without guidance from the Supreme Court of the United States on the central issue involved here. In Planned Parenthood of Cent. Mo. v. Danforth, supra, four members of the Court, dissenting on the parental consent issue, joined in the view that parental consent was a constitutionally acceptable precondition to performing an abortion

on an unmarried woman under eighteen years of age. See id. 428 U.S. at 92-96, 96 S. Ct. at 2852-2853 (White, J., Burger, C.J., & Rehnquist, J., concurring in part and dissenting in part); id. at 101-105, 96 S. Ct. at 2856-2857 (Stevens, J., concurring in part and dissenting in part). Two Justices who joined in striking down Missouri's absolute parental veto expressed a view which seems to find acceptable a statute which "would not impose parental approval as an absolute condition upon the minor's right but would assure in most instances consultation between the parent and child." Id. at 91, 96 S. Ct. at 2851 (Stewart & Powell, JJ., concurring).

With those views of our role in this matter and of the unsettled state of the law on the permissible extent, if any, of parental involvement in an unmarried minor's abortion decision,

we turn to the nine questions certified to us. Each of the nine questions will be considered in order in sections of the opinion numbered to correspond to the number of the question being answered. The relevant question will be set forth in a footnote to the heading of each section.

## 1. The Statutory Standard for Parental Consent.<sup>4</sup>

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<sup>4</sup> "1. What standards, if any, does the statute establish for a parent to apply when considering whether or not to grant consent?

"a) Is the parent to consider 'exclusively . . . what will serve the child's best interest'?\*  
(\*Appellants' brief before the Supreme Court, p. 23. But cf. Baird v. Bellotti, D. Mass., 1975, 393 F. Supp. 847, at 855.)

"b) If the parent is not limited to considering exclusively the minor's best interests, can the parent take into consideration the 'long-term consequences to the family and her parents' marriage relationship'?\*  
(\*Defendants' brief in this court, p. 16.)

"c) Other?"

[end of footnote]

This question concerns the standard which should be applied by a parent in deciding whether to consent to an abortion for his or her unmarried daughter. The statute provides no explicit standard. In the District Court, the defendants agreed that a parent could consider matters not exclusively relating to the minor's personal interests. Baird v. Bellotti, 393 F. Supp. at 855. Before the Supreme Court, the defendants abandoned this position and argued that the only appropriate parental considerations were those which focused on the best interests of the minor. In light of the Court's opinion in Planned Parenthood of Cent. Mo. v. Danforth, supra, abrogating an absolute parental veto, we construe § 12P so as to avoid any constitutional question, as far as possible, and answer that the parent is to consider "exclusively . . what will serve the child's best

interest." We thus answer question 1(a) in the affirmative and need not answer questions 1(b) and 1(c). In many instances, the "best interest of the child" standard has been adopted in this Commonwealth where the rights and concerns of a minor have been in issue. See cases cited in our answer to question 3, infra at \_\_\_\_\_<sup>a</sup>, 360 N.E.2d at 295-296.

There is, of course, no penalty if a parent does not apply the proper standard in deciding whether to consent to his or her child's request for consent to an abortion. Our answer may be of assistance, however, in guiding parents' consideration of the question and, as we explain in our answer to the next question, is of importance to any judge to whom the question of judicial consent is presented.

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<sup>a</sup> Mass. Adv. Sh. (1977) at 109-110.

2. The Statutory Standard for a Judicial Order Granting Consent.<sup>5</sup>

Section 12P provides that if one or both of the minor's parents refuse consent, "consent may be obtained by

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5 "2. What standard or standards is the superior court to apply?

"a) Is the superior court to disregard all parental objections that are not based exclusively on what would serve the minor's best interests?

"b) If the superior court finds that the minor is capable, and has, in fact, made and adhered to, an informed and reasonable decision to have an abortion, may the court refuse its consent based on a finding that a parent's, or its own, contrary decision is a better one?

"c) Other?"

[end of footnote]

order of a judge of the superior court for good cause shown . . . ." Here there is a statutory standard of "good cause." The second question inquires concerning the role of the judge in applying the "good cause" standard.

We think it clear, answering question 2(a), that the same considerations referred to in answering question 1 must be applied by a judge of the Superior Court. He must disregard all parental objections, and other considerations, which are not based exclusively on what would serve the minor's best interests. If the judge were to exercise his authority on a standard broader than that to which a parent must adhere, we believe that the Commonwealth, through its judicial arm, could be exercising a power which the Supreme Court has said a State may not exercise. Planned Parenthood of Cent. Mo. v. Danforth, supra, 428 U.S.

at 75, 96 St. Ct. at 2844. In any event, the constitutional question is avoided, or at least limited, by our construction that "good cause" means that the judge may give consent to an abortion where it is shown that, in spite of the disapproval of one or both parents, the best interests of the minor will be served if the abortion is performed. In granting consent, the judge, of course, may impose reasonable conditions which will protect those best interests.

Question 2(b) concerns what a judge must do in passing on the question whether the best interests of the minor will be served. Unless a contrary conclusion is compelled constitutionally, we do not view the judge's role as limited to a determination that the minor is capable of making, and has made, an informed and reasonable decision to have an abortion. Certainly the judge

must make a determination of those circumstances, but, if the statutory role of the judge to determine the best interests of the minor is to be carried out, he must make a finding on the basis of all relevant views presented to him. We suspect that the judge will give great weight to the minor's determination, if informed and reasonable, but in circumstances where he determines that the best interests of the minor will not be served by an abortion, the judge's determination should prevail, assuming that his conclusion is supported by the evidence and adequate findings of fact.

3. Parental Consultation as a Requirement.<sup>6</sup>

Question 3 asks the extent to which, if at all, a court order for an abortion may be obtained without consultation with the minor's parents. The defendants argued before the Supreme Court, contrary to their earlier views (see Baird v. Bellotti,

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<sup>6</sup> "3. Does the Massachusetts law permit a minor (a) 'capable of giving informed consent,' or (b) 'incapable of giving informed consent,' 'to obtain [a court] order without parental consultation'?\* (\*See Supreme Court opinion, 428 U.S. p. 145, 96 S. Ct. p. 2865. Defendants contended to the contrary before us. See also, c. 112, § 12R.)"

[end of footnote]

393 F. Supp. at 855), that "a mature minor capable of giving informed consent [may] obtain . . . an order permitting the abortion without parental consultation," and that "even a minor incapable of giving informed consent [may] obtain an order without parental consultation where there is a showing that the abortion would be in her best interests." Bellotti v. Baird, supra, 428 U.S. at 145, 96 S. Ct. at 2865.

The defendants argue here that "if a minor has the capacity for informed judgment, the rationale for parental consent ceases . . ." and, in compelling circumstances, a court may grant consent to an abortion without parental involvement, both where the minor qualifies under "the mature minor rule" and where she does not. The defendants state that a case-by-case consideration will safeguard "the general role for parents contemplated by the

Legislature, without jeopardizing the statute's protective concerns." They argue, however, for "parental consultation in all but the most compelling situations."<sup>7</sup>

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<sup>7</sup> The defendants state further: "While it is difficult to describe the contours of such situations in the abstract, defendants suggest that generally parental consultation should be encouraged in mature minor cases. In other cases consultation should be required unless the Superior Court is convinced, after hearing, that consultation would threaten the minor's safety or well-being or otherwise adversely affect her best interests. Absent convincing proof of such danger, § 12P should be held to require the Superior Court to withhold authorization for abortion procedures until a minor's parents have been consulted."

[end of footnote]

The Legislature has left no room to apply a mature minor rule where an unmarried minor seeks an abortion without parental consultation. Section 12N of G.L. c. 112, inserted by St. 1974, c. 706, § 1, states that, in the absence of an emergency, no abortion may be performed unless "the written informed consent of the proper person or persons has been delivered to the physician performing the abortion as set forth in [§ 12P]." Section 12N is all-inclusive, manifesting a clear legislative intention that the consent required by § 12P be obtained for every nonemergency abortion where the mother is less than eighteen years of age and unmarried. Section 12P in turn is explicit in stating that a judge should pass on an application for a consent order only after one or both parents have declined to consent to the abortion. Section 12P(1) states

that a judge may act "[i]f one or both of the mother's parents refuse . . . consent." Prior parental consultation is thus contemplated by the statute. If only one parent is available, he or she must be consulted. If neither parent is available, the minor's guardian, a person having similar duties, or any person who has assumed the care and custody of the minor must be consulted. We recognize, as G.L. c. 112, § 12N, states, that the consent provisions of § 12P have no application "in an emergency requiring immediate action," and presumably where no parent (or statutory substitute) is available. Although § 12N and § 12P do not deal with the situation where no parent (or statutory substitute) is available, we have no hesitancy in concluding that a judge is not barred from granting consent to an abortion in such a situation.

As we have indicated, it is not our function to determine whether parental consultation is a constitutionally permissible precondition to a court order. We point out, however, that there is no absolute parental veto inherent in § 12P. If the word veto has an application here, it is, by analogy to the legislative process, a veto which may be overridden. We also note that the views of the parents concerning the medical treatment which is to be furnished their child may have a beneficial influence (a) on the circumstances under which the abortion is to be performed, including the quantity and quality of pre-operative counseling, medical care, and personal attention, and (b) on the amount, source, and quality of post-operative assistance and counseling, including birth control counseling, which the minor will receive.

If these and other considerations in support of parental consultation do not justify mandatory parental consultation where there is no emergency and where at least one parent, or a person with equivalent responsibilities, is available, § 12P must be construed to require as much parental consultation as is permissible constitutionally. In such a situation, the judge will have to determine whether circumstances exist which make prior parental consultation impermissible constitutionally.

The defendants argue that the Legislature did not intend to abrogate any common law right to consent to an abortion which a minor had and that a mature minor at common law could obtain a valid court order authorizing an operation without prior parental consultation. We think that the effect of §§ 12N and 12P is clear in abrogating any such common law right to an abortion, assuming its existence.

The last paragraph of § 12P(2), which is set forth in n. 3 above, does not preserve any such common law right. Indeed, it suggests that any common law right of the minor is foreclosed. That language preserves "any common law rights of any other person" (emphasis supplied) relative to consent to the performance of an abortion for the purposes of a civil action or of a petition under G.L. c. 112, § 12R, to enjoin the performance of an abortion. That language does not refer to the minor.<sup>8</sup>

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<sup>8</sup> It is unclear whose consent the Legislature may have had in mind by this language in § 12P(2). Certainly it could not have been the potential father. Approximately four weeks prior to the enactment of St. 1974, c. 706, this court, by a divided vote,

(footnote continued)

We think, however, that it may be of assistance to the District Court to state the extent to which a mature minor rule of the character urged by the defendants would have been applicable if § 12P had not been passed. By doing so, we will disclose the impact of § 12P on the rights of minors.

A mature minor rule has been accepted in other jurisdictions, thereby relaxing the harshness of a rigid requirement of parental consent.

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(footnote continued)

<sup>8</sup> determined that even a husband's consent could not be a condition precedent to the performance of an abortion on his wife (Doe v. Doe, 365 Mass. 556, 314 N.E.2d 128 [1974]), a view which was accepted by the Supreme Court in Planned Parenthood of Cent. Mo. v. Danforth, supra, 428 U.S. at 68-69, 96 S. Ct. at 2841.

[end of footnote]

See, e.g., Younts v. St. Francis Hosp. & School of Nursing, Inc., 205 Kan. 292, 301, 469 P.2d 330 (1970) (seventeen year old, skin graft to fingertip); Gulf & S.I.R. Co. v. Sullivan, 155 Miss. 1, 10, 119 So. 501 (1928) (seventeen year old, small pox vaccination); Lacey v. Laird, 166 Ohio St. 12, 14, 139 N.E.2d 25 (1956) (eighteen year old, plastic surgery to nose). See also 1 F. Harper & F. James, Torts § 3.10 at 235 & n. 23 (1956); W. Prosser, Torts § 18 at 103 & n. 51 (4th ed. 1971); Restatement (Second) of Torts § 59 (1965); Restatement of Torts § 892 (1939); Bennett, Allocation of Child Medical Care Decision-Making Authority; A Suggested Interest Analysis, 62 Va. L. Rev. 285, 289-290 (1976); Pilpel & Zuckerman, Abortion and the Rights of Minors, 23 Case W.Res.L.Rev. 779, 782-783 & n. 13 (1972). The mature minor rule calls for an analysis of

the nature of the operation, its likely benefit, and the capacity of the particular minor to understand fully what the medical procedure involves. See Wadlington, Minors and Health Care: The Age of Consent, 11 Osgoode Hall L.J. 115, 117-119 (1973). Judicial intervention is not required. If judicial approval is obtained, however, the doctor is protected from a subsequent claim that the circumstances did not warrant his reliance on the mature minor rule, and, of course, the minor patient is afforded advance protection against a misapplication of the rule.

Our cases have given no explicit sanction to the view that, without parental involvement, an unemancipated but mature minor may consent to an operation, where one or both parents are available and where there is no medical emergency. The defendants argue that the mature minor doctrine

has been applied by Justices of this Court when permitting a bone marrow transplant from a healthy minor to a critically ill sibling. However, in all of these cases, parental consent was obtained, and, in some cases, judicial approval of the operation was granted where the minor donor clearly was not one capable of granting an informed consent to the operation. These cases, therefore, involve both parental and judicial authorization of an operation and do not rely on the application of the mature minor rule. See Baron, Botsford & Cole, Live Organ and Tissue Transplants from Minor Donors in Massachusetts, 55 B.U.L.Rev. 159 (1975).

There are cases, however, where a minor's views have been permitted to influence judicial action. In custody matters, the well-being of the child is paramount (Vilakazi v. Maxie, \_\_\_\_\_)

Mass. \_\_\_, \_\_\_<sup>b</sup>, 357 N.E.2d 763 (1976) and the preferences of the child may be considered. Purinton v. Jamrock, 195 Mass. 187, 201, 80 N.E. 802 (1907). Dumain v. Gwynne, 10 Allen 270, 275 (1865). Curtis v. Curtis, 5 Gray 535, 537 (1855). A marriage ceremony involving a freely assenting minor, acting without parental consent, has been held valid, although, because of the minor's age, the ceremony was performed in violation of law. Parton v. Hervey, 1 Gray 119, 121 (1854). Where a child has been placed in someone's care by agreement of the parents, the wishes of the child to remain in that person's care have been given weight. Curtis v. Curtis, supra. Commonwealth v. Hammond, 10 Pick. 274, 275 (1830).

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<sup>b</sup> Mass. Adv. Sh. (1976) 2685, 2689-2690.

We have suggested that, if a minor of sufficient maturity assents to being taken from one having legal custody of him, the act would not involve the crime of false imprisonment.

Commonwealth v. Nickerson, 5 Allen 518, 527 (1862). None of these cases, of course, concerns nonemergency medical treatment of an unemancipated minor wishing to act without parental involvement.

We have never held or implied on common law grounds that a physician may operate on a minor, where there is no emergency, without the consent of at least one parent. We have indicated that such an unauthorized operation constitutes an intentional tort. See Reddington v. Clayman, 334 Mass. 244, 246-247, 134 N.E.2d 920 (1956). The Legislature's treatment of the subject of consent to medical treatment of a minor has been consistent with the general common law

principle that parental consent is necessary for medical services to be performed in the absence of an emergency.<sup>9</sup>

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<sup>9</sup> General Laws c. 111, § 117, states that a physician's treatment of an assenting minor suffering from a venereal disease does not constitute an assault or an assault and battery.

General Laws c. 112, § 12E, authorizes a drug dependent minor twelve years of age or older to consent effectively to hospital and medical care related to the diagnosis or treatment of his or her drug dependency (except methadone maintenance therapy) and expressly disclaims any need for parental consent.

General Laws c. 112, § 12F, as appearing in St. 1975, c. 564, which

(Footnote continued)

Although our opinions do not explicitly support a mature minor rule, we have never been asked to apply such a principle. Particularly, we have never been asked to pass on the necessity of parental consent to a medical procedure to which a minor may be entitled by constitutional right. The case for a mature minor rule has

(Footnote cont.)

<sup>9</sup> we discuss more fully below in answering question 6, sets forth a legislative mature minor rule (or perhaps an emancipated minor rule, or both), allowing consent for most medical and dental care, but the rule is inapplicable to abortions for minors who have never been married and does not include all minors who might qualify in particular circumstances for application of a mature minor rule.

[end of footnote]

particular force in such a case. This circumstance no doubt has prompted the Attorney General and all the district attorneys of the Commonwealth to urge that parental consultation is not always required in an abortion situation.

We conclude that, apart from statutory limitations which are constitutional, where the best interests of a minor will be served by not notifying his or her parents of intended medical treatment and where the minor is capable of giving informed consent to that treatment, the mature minor rule applies in this Commonwealth. In such a case, although judicial involvement is not required, court approval may be sought, and, if it is, a judge may give effective consent to the performance of an operation or other treatment. We have already indicated, however, that as to abortions there is

a statutory requirement of parental consultation. Thus we stress that the answer to question 3 is negative. Parental consultation for an abortion is required by statute in all cases, other than in an emergency or where there is no parent (or the equivalent) available. Our discussion of the mature minor rule as to operations generally has no application to nonemergency abortions because parental consultation, if possible, is mandated by statute. To the extent the District Court concludes that parental consultation is not permissible constitutionally, but only to that extent, is parental consultation not required. If there is a situation where parental consultation is not possible or where parental consultation (and notification) may not be imposed because of constitutional limitations, the judge should make precise findings

in support of his conclusion because, in such a case, the parents will not be involved and cannot challenge the judicial determination by appeal. These findings should include a determination of the degree of seriousness of the operation, its benefit to the minor, and the capacity of the minor to understand the circumstances and to consent to the operation.

Although we cannot say that there will never be a circumstance where parental consultation may be dispensed with where the minor is not capable of giving informed consent to a nonemergency operation, we expect that, as a general rule, the best interests of a minor will not be served by dispensing with consultation with the parents of such a minor. As we have said, however, as to abortion, parental consultation is mandatory.

#### 4. Parental Notification.<sup>10</sup>

This question assumes that prior parental consultation is not required in all instances and inquires concerning the extent to which notification of the minor's parents may be ordered for good cause by a Superior Court judge either before or after he acts on a minor's request for consent. We point out that our answer to question 3 indicates that, before a judge acts on a petition for consent, the minor's parents must be consulted and, therefore, the assumption made

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<sup>10</sup> "4. If the court answers any of question 3 in the affirmative, may the superior court, for good cause shown, enter an order authorizing an abortion, (a), without prior notification to the parents, and (b), without subsequent notification?"

[end of footnote]

in the fourth question is not applicable unless constitutional requirements forbid requiring parental consultation. If they are available, the parents of a minor must be notified of any proceeding brought by her to obtain judicial consent to an abortion and will be entitled to participate. If, however, parental consultation is barred by constitutional considerations in certain instances, perhaps notification of the judicial proceeding will be barred as well. We say that, apart from constitutional restraints, notification to the parents of the judicial proceeding, in advance if possible, is required, and thus we answer question 4 in the negative. We recognize that there may be instances in which the parents are unavailable and the judge must act. In such a case, consultation is impossible, but subsequent

notification of the proceeding may not be. Unless barred by constitutional considerations, notification of a minor's parents concerning the judicial proceedings is required.

#### 5. Procedures for Expedited Decisions.<sup>11</sup>

The presence or absence of the opportunity for prompt disposition of any judicial proceeding under § 12P is an important consideration in measuring the burden which § 12P places on the minor's constitutional

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<sup>11</sup> "5. Will the Supreme Judicial Court prescribe a set of procedures to implement c. 112, § 12P which will expedite the application, hearing, and decision phases of the superior court proceeding provided thereunder? Appeal?"

[end of footnote]

right to an abortion. Thus, by question 5, the District Court has inquired whether we will prescribe a set of procedures to expedite the application, hearing, and decisional phases of the Superior Court proceeding. We answer question 5 in the affirmative, in the sense that, if the operation of the system requires our involvement by rule or order, we will become involved. We note, however, that the Superior Court has its own rulemaking power, and, in the first instance, we would defer to the judges of that court to determine what, if any, specific rules are needed.

Every court day questions are presented to Superior Court judges which require prompt decision. Section 12P provides just one example of the kind of matter in the Superior Court which calls for early disposition. We are not certain how

far present practices need to be supplemented by specific rules relating to requests for orders under § 12P.

Prompt resolution of a § 12P proceeding may be expected. On any court day, hardly any person in the Commonwealth is more than one or two hours' travel from a court house where a Superior Court judge is available to process an application under § 12P. The proceeding need not be brought in the minor's name and steps may be taken, by impoundment or otherwise, to preserve confidentiality as to the minor and her parents. The judge can issue an order of notice providing for an early hearing. The defendants will be the parents, if they have denied their consent, and, according to the suggestion to us in his brief, if the parents are not available or need not be consulted because of a constitutional bar to consulting them,

the Attorney General will be the appropriate defendant. Section 12P(1) provides that the judge need not appoint a guardian for the minor. If, however, in his discretion, the judge determines to appoint counsel or a guardian ad litem for the minor (a point discussed under question 7), the process need not be long delayed. After determining what representation the minor may need, the question of parental consultation may have to be considered, and finally, perhaps at a somewhat later date depending on the answer to the parental consultation issue, the judge will have to determine whether he should authorize the abortion. At each stage, a record of the proceedings will be preserved. The judge will appreciate the need for an early determination of the issues and the filing of findings of fact. If more is needed to expedite a § 12P proceeding, such as the availability

of application forms for unrepresented minors, we anticipate that the Superior Court, aided by clerks of court and the Attorney General, will take the necessary steps to implement the necessary procedures. If, as we have said, the involvement of this court is required to assure expeditious implementation of § 12P proceedings, we answer the first portion of question 5 in the affirmative.

The second portion of question 5 concerns the prospect of expeditious appeals. We have no question concerning the speedy disposition of any appeal. The case of Doe v. Doe, 365 Mass. 556, 314 N.E.2d 128 (1974) concerning an abortion question, was reported to this court for decision on March 12, 1974, and argued before the full court on March 13, 1974. We entered a dispositive order on March 14, 1974. Although this prompt

disposition may have been facilitated by the fact that the case was entered in the Supreme Judicial Court for the county of Suffolk and promptly reserved and reported for decision by a single justice of this court, we believe that an early hearing and decision on appeal from a judgment of a Superior Court judge may also be achieved. The Appeals Court, to which the appeal would be taken, is in as good a position as this court to provide a prompt hearing and early disposition. A request for direct appellate review by this court might be filed in this court, and, if it were, that request would be acted on promptly. In any event, this court has general superintendence over the lower courts and at any stage may transfer any case to it for disposition or other action, if the need should arise. G.L. c. 211, § 4A.

#### 6. The Relationship of § 12P and G.L. c. 112, § 12F.<sup>12</sup>

The sixth question concerns the differences between (a) the grounds and procedures for showing good cause under § 12P and (b) the standard and procedures contained in G.L. c. 112, § 12F, as appearing in St. 1975, c. 564, which is set forth in the margin.<sup>13</sup>

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<sup>12</sup> "6. To what degree do the standards and procedures set forth in c. 112, § 12F (Stat. 1975, c. 564), authorizing minors to give consent to medical and dental care in specified circumstances, parallel the grounds and procedures for showing good cause under c. 112, § 12P?"

<sup>13</sup> "No physician, dentist or hospital shall be held liable for  
(Footnote continued)

(Footnote continued)

<sup>13</sup> damages for failure to obtain consent of a parent, legal guardian, or other person having custody or control of a minor child, or of the spouse of a patient, to emergency examination and treatment, including blood transfusions, when delay in treatment will endanger the life, limb, or mental well-being of the patient.

"Any minor may give consent to his medical or dental care at the time such care is sought if (i) he is married, widowed, divorced; or (ii) he is the parent of a child, in which case he may also give consent to medical or dental care of the child; or (iii) he is a member of any of the armed forces; or (iv) she is pregnant or believes herself to be pregnant; or (v) he is living separate and apart

(Footnote continued)

(Footnote continued)

<sup>13</sup> from his parent or legal guardian, and is managing his own financial affairs; or (vi) he reasonably believes himself to be suffering from or to have come in contact with any disease defined as dangerous to the public health pursuant to section six of chapter one hundred and eleven; provided, however, that such minor may only consent to care which relates to the diagnosis or treatment of such disease.

"Consent shall not be granted under subparagraphs (ii) through (vi), inclusive, for abortion or sterilization.

"Consent given under this section shall be subject to later disaffirmance because of minority. The consent of the parent or legal guardian shall not be required to

(Footnote continued)

(Footnote continued)

<sup>13</sup> authorize such care and, notwithstanding any other provisions of law, such parent or legal guardian shall not be liable for the payment for any care rendered pursuant to this section unless such parent or legal guardian has expressly agreed to pay for such care.

"No physician or dentist, nor any hospital, clinic or infirmary shall be liable, civilly and criminally, for not obtaining the consent of the parent or legal guardian to render medical or dental care to a minor, if, at the time such care was rendered, such person or facility: (i) relied in good faith upon the representations of such minor that he is legally able to consent to such treatment under this section; or (ii) relied in good faith upon the representations of such

- (Footnote continued)

(Footnote continued)

<sup>13</sup> minor that he is over eighteen years of age.

"All information and records kept in connection with the medical or dental care of a minor who consents thereto in accordance with this section shall be confidential between the minor and the physician or dentist, and shall not be released except upon the written consent of the minor or a proper judicial order. When the physician or dentist attending a minor reasonably believes the condition of said minor to be so serious that his life or limb is endangered, the physician or dentist shall notify the parents, legal guardian or foster parents of said condition and shall inform the minor of said notification."

[end of footnote]

The 1975 amendment to § 12F, which was characterized above as a limited, statutory mature minor rule, was enacted after the decision of the District Court in this case. Section 12F grants doctors, dentists, and hospitals immunity from liability for damages for failure to obtain parental or similar consent to emergency treatment when delay would endanger the life, limb, or mental well-being of the patient. Section 12F next provides that a minor who is married, widowed, or divorced may consent to medical or dental care, including an abortion or sterilization. Certain other minors, including one who is a parent, is a member of the armed forces, is pregnant or believes herself to be pregnant, or is living apart from his parents and managing his own affairs, are authorized to consent to medical and dental care but not to an abortion or sterilization.

If the physician or dentist reasonably believes that the condition of the minor is so serious that life or limb is endangered, he must notify the minor's parents and advise the minor that he has notified his or her parents.

In the Supreme Court of the United States, the plaintiffs pointed to the new provisions of § 12F and argued that § 12F heightened the discrimination between unmarried minors seeking abortions and minors seeking other medical procedures. The Supreme Court declined to pass on the propriety of any distinction in Massachusetts between abortion and other medical procedures, observing that the constitutionality of any distinction will depend on its degree and the justification for it. Bellotti v. Baird, supra, 428 U.S. at 148-150, 96 S. Ct. at 2867. It concluded that any analysis of the

degree of distinction between consent for abortions and the consent procedures for other medical procedures could not be made until this court defined the nature of the consent required for abortions. Id. at 150, 96 S.Ct. at 2867. The Supreme Court concluded that "it would not be inappropriate for the District Court . . . to certify a question [to this court] concerning the meaning of the new statute, and the extent to which its procedures differ from the procedures that must be followed under § 12P." Id. at 151-152, 96 S. Ct. at 2868.<sup>14</sup>

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<sup>14</sup> The Supreme Court also observed that the claim of impermissible discrimination due to the 1975 statute obviously had not been raised in the District Court, but was "subject to

(Footnote continued)

The grounds for consenting to an abortion under § 12P, which we have defined as the best interests of the minor, are not different from the standards to be applied in determining whether some other medical procedure should be performed on a minor pursuant to § 12F. In each instance, a physician must exercise his or her medical judgment and the minor must consent to the procedure as being in

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(Footnote continued)

<sup>14</sup> inquiry through an amended complaint, or perhaps by other means." Id. at 151, 96 S. Ct. at 2868. We are not informed of any amendment of the District Court complaint. At oral argument counsel for the plaintiffs indicated that the "equal protection" point would be presented subsequently in the District Court.

[end of footnote]

his or her best interests.<sup>15</sup>

The difference between § 12P, concerning an abortion, and § 12F, concerning other medical operations, lies in the procedures which must be followed in arriving at the conclusion that the particular operation will be in the best interests of the minor. Under § 12F, a married, widowed, or divorced minor may consent to any and all medical services without the intervention of either his or her parents or of a court. Thus, the requirements of § 12P concerning parental or judicial approval of an abortion are inapplicable to such

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<sup>15</sup> We put aside in this analysis those minors who are not capable of giving an informed consent. In each case (§ 12F and § 12P), consent may have to be obtained from one or both parents or from a court.

[end of footnote]

minors. All other minors described in § 12F seeking abortions must pursue the procedures of § 12P, although they are free to consent to any other medical procedure (except sterilization) without the involvement of their parents or of a judge. Minors not described in § 12F have only their common law rights to consent to medical services, except as expanded or limited by statute. If these classifications of minors can be sustained against any equal protection challenge advanced by the plaintiffs, no "saving construction" of § 12P (or perhaps of § 12F)<sup>16</sup> will be necessary.

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<sup>16</sup> Statute 1975, c. 564, by which G.L. c. 112, § 12F was amended, does not contain a severability clause as does St.1974, c. 706, amending G.L. c. 112, § 12P. See St.1974, c. 706, § 2.

[end of footnote]

In this court, particularly in oral argument, the plaintiffs have urged that we should declare that the statutory distinction between minors seeking abortions and those seeking other medical services is invidiously discriminatory under art. 10 of the Declaration of Rights of the Constitution of the Commonwealth, our Massachusetts "equal protection" clause. See Opinion of the Justices, 357 Mass. 827, 830, 257 N.E.2d 94 (1970). No question under the Constitution of the Commonwealth has been certified to us. Indeed, none has been raised yet in the District Court. The matter has not been briefed by any party beyond the plaintiffs' truncated argument in the one and one-half pages of their brief which constitute their entire discussion of the sixth question certified to us. We decline to deal with any State constitutional issue in

answering the questions put to us. However, in answering the sixth question we are aware that equal protection of the laws considerations are substantially the same under the State and Federal Constitutions and that, as with other matters we have considered, the interrelationship of § 12P and § 12F (the 1975 statute) must be interpreted so as to avoid constitutional problems as far as possible.

For this reason, in response to question 9, infra \_\_\_\_<sup>c</sup>, 360 N.E.2d 302-303, we discuss the possible consequences of a determination that one or more of the classifications made by §§ 12P and 12F are impermissible on Federal equal protection of the law grounds.

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<sup>c</sup> Mass. Adv. Sh. (1977) 124-126.

7. Appointment of Counsel for an Indigent Minor.<sup>17</sup>

If a judge of the Superior Court determines that the best interests of an indigent minor would be served by the appointment of counsel to represent the minor, the court has the power to appoint counsel for the minor to assist her in the assertion of her constitutional rights. Section 12P(1) states that the judicial proceeding concerning consent "will not require the appointment of a guardian for the mother." However, § 12P(1) does not forbid the appointment of a guardian ad litem to represent the minor, and thus implies that a judge may make such an appointment. We doubt that the

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Legislature intended in all cases that an indigent minor should proceed without counsel in seeking authorization of an abortion, whether she is proceeding in opposition to her parents or in the absence of parental involvement. If the mere existence of the "burden" of seeking judicial consent to an abortion is not constitutionally onerous (and apparently these plaintiffs have not yet so claimed in the District Court), the circumstances that an indigent minor may have counsel appointed for her lightens the "burden" and tends to make the requirement more acceptable constitutionally. Even apart from the positive implication of § 12P, a judge of the Superior Court has the power to appoint counsel for an indigent minor

<sup>17</sup> "7. May a minor, upon a showing of indigency, have court-appointed counsel?"

[end of footnote]

in these circumstances. See G.L. c. 220, § 2.<sup>18</sup>

Although all parties agree on an affirmative answer to question 7, the brief for the Attorney General adverts to the possible argument that a judge may not appoint counsel unless public funds are available for the payment of the reasonable fees of the minor's counsel.<sup>19</sup> If the issue should

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<sup>18</sup> Rule 17(b) of the Massachusetts Rules of Civil Procedure, authorizes a judge to appoint a guardian ad litem to represent a minor in the proceeding before him or to "make such other order as [he] deems proper for the protection of the [minor] . . . ." 365 Mass. 763 (1974).

<sup>19</sup> We hope that significant numbers of competent attorneys would be willing

(Footnote continued)

arise, an obligation to pay the reasonable fees of a minor's attorney might be found even in the absence of an appropriation. See O'Coin's Inc. v. Treasurer of the County of Worcester, 362 Mass. 507, 510, 515, 287 N.E.2d 608 (1972); G.L. c. 213, § 8. If a county must pay the cost of court-appointed counsel in a criminal case, regardless of prior appropriation, even where the appointment of counsel may be

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(Footnote continued)

to act without fee in these circumstances and would advise clerks' offices of their willingness to serve so that a list of attorneys could be used in making such appointments. If such is not the case, we do not know that funds have not been appropriated, and will not be appropriated, for expenses of this character.

[end of footnote]

mandated only by court rule and not by constitutional considerations (see Abodeely v. County of Worcester, 352 Mass. 719, 723-724, 227 N.E.2d 486 [1967]), we see no reason to deny counsel for an indigent minor in asserting a constitutional right to an abortion in a State-mandated civil proceeding before a judge of the Superior Court.<sup>20</sup>

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<sup>20</sup> In Payne v. Superior Court of Los Angeles County, 17 Cal.3d 908, 132 Cal.Rptr. 405, 553 P.2d 565 (1976), the Supreme Court of California held (four to three) that, in certain circumstances, an incarcerated, indigent defendant may be entitled constitutionally to the appointment of counsel to handle his defense of a civil action. The court there disclaimed any power to order that

(Footnote continued)

In order to avoid a constitutional question concerning the burden on the assertion of a minor's constitutional rights which would arise from a contrary interpretation, we construe the statutes of the Commonwealth to authorize the appointment of counsel or a guardian ad litem for an indigent minor at public expense, if necessary, if the judge, in his discretion, concludes that the best interests of the minor would be served by such an appointment.

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(Footnote continued)

counsel should be paid from public funds. Id. at 920 n. 6, 132 Cal.Rptr. 405, 553 P.2d 565. In the Payne case, the fundamental issue in the underlying civil action did not involve the incarcerated indigent defendant's assertion of a constitutional right.

[end of footnote]

8. The Physician's Reasonable and Good Faith Belief as a Defense.<sup>21</sup>

A physician who believes, reasonably and in good faith, that a minor is eighteen or more years old or has been married, divorced or widowed, although it is not a fact, has a defense to criminal prosecution for performing an abortion on that minor.

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<sup>21</sup> "8. Is it a defense to his criminal prosecution if a physician performs an abortion solely with the minor's own, valid, consent, that he reasonably, and in good faith, though erroneously, believed that she was eighteen or more years old or had been married?"

The word "valid" may not be an appropriate one in the context of the question.

[end of footnote]

We answer question 8 in the affirmative. The fifth paragraph of § 12F, quoted in n. 13 above, provides such a protection to a physician. Although § 12F is not concerned primarily with abortion procedures, the Legislature did not except abortions from the broad grant of protection of the fifth paragraph of that section, as it did exempt abortions from certain other provisions of § 12F. See the third paragraph of § 12F. A construction of § 12F which would not extend to physicians performing abortions the same protection extended to physicians performing other operations would raise a constitutional question which we avoid by the construction of § 12F which we have adopted.

9. Other Comments.<sup>22</sup>

Question 9 invites this court, if it wishes, to make any other comments about § 12P which might assist the District Court in determining whether § 12P infringes the Constitution of the United States. Rule 3:21 of this court, setting forth the certification procedure, contemplates that only questions of law will be certified. Question 9 is not a question of law. However, question 9 presents a practical solution to the problem that there may be questions concerning § 12P which we have not been asked but as to which we have views which might

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<sup>22</sup> "9. Will the Court make any other comments about the statute which, in its opinion, might assist us in determining whether it infringes the United States Constitution?"

[end of footnote]

be instructive to the District Court in this bifurcated, cooperative decision making process. Of course, even if not asked, we might volunteer unsolicited comments on State law which could be largely dispositive of the matter before the District Court.<sup>23</sup>

Thus, as we indicated we would in our answer to question 6, we take this opportunity to comment on the consequences of a determination that the differing procedures of § 12P and § 12F, as interpreted by us apart from

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<sup>23</sup> See Tarr v. Republic Corp., N.H., 352 A.2d 708, 714 (1976), where the Supreme Court of New Hampshire answered an uncertified question and therafter the Federal courts treated that answer as dispositive. See Tarr v. Manchester Ins. Corp., 544 F.2d 14 (1st Cir. 1976).

[end of footnote]

the impact of constitutional considerations, do not survive an equal protection of the laws challenge.

The plaintiffs argue that it is invidious to permit a pregnant minor to consent on her own to any operation, except abortion and sterilization, no matter how serious the operation, as § 12F does on its face, while denying her the right on her own to consent to an abortion, which in most instances (at least in the first trimester) is a relatively minor procedure.<sup>24</sup> The plaintiffs

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<sup>24</sup> The Supreme Court of California has said that a legislative purpose would be irrational if it were "to deny to minors life-saving therapeutic abortions for lack of parental consent while permitting all other pregnancy-related surgical and medical care without the necessity of such

(Footnote continued)

(Footnote continued)

<sup>24</sup> consent." Ballard v. Anderson, 4 Cal.3d 873, 881, 95 Cal.Rptr. 1, 6, 484 P.2d 1345, 1350 (1971) (four to three decision). That court also said (at 883, 95 Cal. Rptr. at 8, 484 P.2d at 1352) that "[t]here is no rational basis for discriminatorily singling out therapeutic abortion as the only type of pregnancy-related surgical care which requires parental consent."

The Supreme Court of Washington has held that statutory distinctions concerning parental consent of the type made by §§ 12F and 12P (but providing a parental veto) do not withstand equal protection scrutiny. State v. Koome, 84 Wash.2d 901, 910, 530 P.2d 260 (1975) (five to four decision). The Court noted the possibility that a requirement of parental consultation might be permissible. Id. at 909, 914, 530 P.2d 260.

[end of footnote]

also challenge the statutory distinction between an unmarried minor and a divorced minor who is given the right to an abortion without parental or judicial consent.

If there is no constitutionally acceptable basis for the legislative distinction between abortions (and sterilization) and other medical procedures, the question will arise as to what the effect of such a determination is on § 12P and § 12F. In that circumstance, § 12F might be construed as applying to all operations, including abortions, in effect eliminating either or both of the parental and judicial consent requirements of § 12P. On the other hand, § 12P might be saved if the scope of § 12F, as it applies to medical procedures for pregnant minors, is construed to apply only to certain medical procedures associated with a determination of pregnancy and

with counseling concerning abortion. The choice, if available constitutionally, is for the Legislature to make, and, of course, it has not done so explicitly. However, we would construe the legislative intent behind the 1975 act (§ 12F) as (a) not favoring an implied repeal of the parental and judicial consent provisions of § 12P and (b) as favoring a restriction on the authorization for consent in § 12F, if necessary to avoid an unconstitutional discrimination, in so far as pregnancy-related operations are concerned.

If the distinction between pregnancy-related operations and other operations cannot withstand an equal protection challenge (and the plaintiffs make no such argument in their brief here), the parental (and judicial) consent provisions of § 12P must fail as far as is necessary to

eliminate the constitutional defect, because we see in § 12F a general legislative intent to eliminate any necessity for parental and judicial consent to operations on minors in the circumstances described in § 12F.

Until the constitutionally unacceptable distinctions, if any, between § 12P and § 12F are defined, we are unable to furnish any further guidance on how § 12P and § 12F should be construed.

#### CONCLUSION

Apart from the effect of any restrictions which are imposed on the Legislature's regulation of abortions because of constitutional considerations, we answer the principal questions as follows. Parental consultation is required in every instance where an unmarried minor seeks a nonemergency abortion.

If the minor's parents (or their equivalent) are unavailable, parental consultation is not required. In deciding whether to consent to an abortion for their unmarried minor daughter, parents should consider only her best interests. If one or both parents refuse consent, a judge of the Superior Court may authorize an abortion for an unmarried minor if he rules that an abortion is in the minor's best interests. The parents, if available, must be notified of the court proceeding and must be allowed to participate in it. The judge in his discretion may appoint counsel or a guardian ad litem for the minor in the court proceeding. The court proceeding must be handled expeditiously.

A stay of the enforcement of § 12P was entered by a Justice of the Supreme Court on July 30, 1976, and the Justices summarily denied motions to vacate the stay. 429 U.S. 892, 97

S. Ct. 251, 50 L.Ed.2d 175 (1976). By its terms that stay expires when this court renders its decision on the certified questions. In order to give the parties and the District Court an opportunity to consider what, if any, further interlocutory order might be appropriate, the clerk of this court will not transmit an attested copy of this opinion to the clerk of the United States District Court, District of Massachusetts, in answer to the questions certified until twenty days after the receipt by him and by the parties of copies of this opinion from the Reporter of Decisions. Otherwise, the Reporter of Decisions and the clerk of this court are to follow the procedure for transmission of answers which is set forth in Hein-Werner Corp. v. Jackson Indus. Inc., 364 Mass. 523, 530-531, 306 N.E.2d 440 (1974).

So ordered.

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

WILLIAM BAIRD; MARY MOE; PARENTS AID SOCIETY, INC.; GERALD ZUPNICK, M.D.,; and all others similarly situated,  
Plaintiffs

v.

FRANCIS X. BELLOTTI, Attorney General of the Commonwealth of Massachusetts; GARRET BYRNE, District Attorney of the County of Suffolk; the District Attorneys for all other Counties, their agents, successors, those acting in concert with them, and all others similarly situated,

Defendants

JANE HUNERWADEL,  
Defendant-Intervenor

Civ. A. No. 74-4992-F

Opinion on Motion for Stay

Feb. 10, 1977

Before ALDRICH, Senior Circuit Judge, JULIAN, Senior District Judge, and FREEDMAN, District Judge.

ALDRICH, Senior Circuit Judge.

To our certification of questions to the Massachusetts Supreme Judicial Court concerning the meaning of, and procedures under, Mass. G.L. c. 112, § 12P, as directed in Bellotti v. Baird, 1976, 428 U.S. 132, 96 S. Ct. 2857, 49 L.Ed.2d 844, the court has made a comprehensive response, Baird v. Attorney General, 1977, Mass., 360 N.E.2d 288. In so doing it has resolved issues of statutory meaning as to which the statute is so uncommunicative on its face that the defendants and intervenor had, in the past, not only disagreed to some extent among themselves, but had

vacillated even in their own views. However, the court has, properly, not ruled on the statute's constitutionality, recognizing that under 28 U.S.C. § 2281, this issue is to be resolved by the federal courts. Plaintiffs seek a stay against the operation of the statute pending that determination. Defendants object, basically, that plaintiffs have not shown a probability of success. They also assert that suspension of the statute will cause irreparable harm to Massachusetts minors.

This last contention hypothesizes the constitutionality of the statute. We do not propose to proceed by assuming the point at issue. We will deal, post, with the separate claim that we should tailor our stay.

With respect to the probability of plaintiffs' success, defendants' refusal to consent to a stay even for briefing - which refusal has, in the

past, led to their immediate application to the Supreme Court - puts us in the position of having to form and articulate our tentative views forthwith. In this we have not been assisted by defendants' assertion in oral argument that, with the exception of the mature minor rule, the Massachusetts court has resolved all issues of statutory construction in accordance with what the Supreme Court indicated might accomplish a constitutional solution. This is not so, as the defendants, when questioned, conceded. In their post-argument brief defendants have modified their contention, now relying for their assertion of constitutionality on their surmise of how the individual Justices felt, based upon deductions they draw from the separate opinions in Planned Parenthood of Central Missouri v. Danforth, 1976, 428 U.S. 52, 96 S. Ct.

2831, 49 L.Ed.2d 788. The surmise is quite unwarranted.<sup>1</sup>

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Defendants' claim, that in Danforth, six of the Justices indicated approval of prior parental consultation, must rest not only on the dissenting opinions, on the parental consent issue, of Justice White, joined by the Chief Justice and Justice Rehnquist, and of Justice Stevens, which defendants quote extensively in their brief, but also on the concurring opinion of Justice Stewart, joined by Justice Powell, which defendants assert is "for present purposes . . . supportive of defendants' position." This last ignores the fact that Justice Stewart, disapproving of an absolute parental veto, states only that parental consultation is desirable "in most cases," expressly referring to the exceptions from the parental consultation requirement which

We believe there should be a stay for three reasons. We say this without, on the one hand, excluding further grounds, and on the other, without suggesting that these views are more than tentative.

First, we are troubled by the fact that the statute does not, in terms, advise parents that all they may consider is the minor's best interest. It would be only natural to read the statute the other way; in fact the defendants, the intervenor, and our dissenting brother, 393 F. Supp. 847, 855, 862, 864, D.C., all did so when the statute was before us initially. The statute will be read

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(footnote cont.)

defendants herein had represented, 428 U.S. 66, 96 S. Ct. 2839, wrongly it turns out, post, to be provided for in the Massachusetts statute.

by parents, and other lay persons, who may not know of, or who may attach no weight to, the Massachusetts court's limitations, and may continue to read it as defendants did originally. This is not an unimportant matter; we have already seen the Massachusetts decision substantially misquoted. Clearly, the freer a parent may feel to refuse consent, the more likely it will be that the minor will have to go to court. To have to go to court, in opposition to her parents' wishes, is a substantial burden on any minor. In this sensitive area, anything that needlessly and incorrectly increases the likelihood of this, imposes a burden that is constitutionally impermissible.

Second, in a significant manner the Massachusetts court's interpretation of the statute has not lived up to the possibility envisaged

by the Supreme Court. At 428 U.S. 145, 96 S. Ct. 2865 the Supreme Court said,

"The picture thus painted by the respective appellants is of a statute that prefers parental consultation and consent, but that permits a mature minor capable of giving informed consent to obtain, without undue burden, an order permitting the abortion without parental consultation, and, further, permits even a minor incapable of giving informed consent to obtain an order without parental consultation where there is a showing that the abortion would be in her best interests. The statute, as thus read, would be fundamentally different from

a statute that creates a 'parental veto'.<sup>2</sup>

The Massachusetts court, however, said just the opposite.

"Parental consultation is required in every instance where an unmarried minor seeks a nonemergency abortion . . . . The parents, if available, must be notified of the court proceeding and must be allowed to participate in it." Mass., 360 N.E.2d 303.

There is already of record strong reason to believe that in some

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<sup>2</sup> For this the Court apparently relied upon defendants' representations as to the legislature's intent, saying that defendants were in a specially good position to know. 428 U.S. 143, 96 S. Ct. 2864.

instances it would not be to the minor's best interests for her parents to know of her condition. The statute deprives the court of the right to make such a finding. To this extent the state is ruling what is to a minor's best interests, instead of consigning the question to an unfettered tribunal. Thus it has diminished the only feature of the statute that could save it from the Court's ruling in Danforth.

Third. Not only has the Massachusetts court contradicted the claim defendants made to the Supreme Court with respect to a minor's opportunity to show, if that be the case, that it would be to her best interests for her parents not to know of her condition, but it has rejected their further claim that a "mature minor" who is "determined by a court to be capable of giving informed

consent will be allowed to do so."<sup>3</sup> 428 U.S. 144, 96 S. Ct. at 2864. We need not presently reach even a tentative view as to whether this difference constitutes an undue state interference with a minor's constitutional right in the particular application, or improperly discriminates generally between

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<sup>3</sup> The Massachusetts court responded in the affirmative to certified question 2b.

"If the superior court finds that the minor is capable, and has, in fact, made and adhered to, an informed and reasonable decision to have an abortion, may the court refuse its consent based on a finding that a parent's, or its own, contrary decision is a better one?" Mass., 360 N.E.2d 293.

abortion and other medical procedures<sup>4</sup> The Supreme Court has, in substance, instructed us to weigh the "degree and the justification" of such limitations. 428 U.S. 150, 96 S. Ct. 2867. This seems our essential task very possibly requiring further evidence. We propose to proceed as promptly as possible, but we do not believe we should be required to do so

<sup>4</sup> We note for the record that there are two aspects to this: the Massachusetts court's ruling that the statute forbids the application to abortions of what would otherwise be the Massachusetts mature minor rule, and a further question, not previously considered, as to the validity of the exclusion of abortions from Mass. G.L. c. 112, § 12F, as added by Mass. Stat. 1975, c. 564. See 428 U.S. 70-71, 96 S. Ct. 2841-2842; Mass., 360 N.E.2d 288, 296, 297 et seq.

under the pressure of the statute's being operative in the meantime.

Defendants lamented orally, in opposing a stay, that the statute has been on the books for two and a half years, and, except for a brief inadvertent interval, the intent of the legislature has been frustrated for that period. We cannot resist pointing out that defendants, at one time or another, have not only changed their opinion as to what was the legislative intent, but have been twice mistaken. We think that before hurrying to put the legislature's intent into operation it would be well to find out what it is. We make this observation because, in spite of our having abstained in order to have the Massachusetts court instruct us as to the statute's meaning, that court has expressed only its present view, and has added an elastic clause under which the statute will seemingly mean

whatever the Supreme Court determines that, constitutionally, it ought to mean.<sup>5</sup> Although in their brief defendants make no direct reference to this portion of the Massachusetts court's opinion, they do argue that if we feel that the statute is unconstitutional because of some of its terms, we should enjoin the operation only of that portion. We cannot agree. We note, first, that the Massachusetts court's apparent delegation of authority, in effect to

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5 "If the Supreme Court concludes that we have impermissibly assigned a greater role to the parents than we should or that we have otherwise burdened the minor's choice unconstitutionally, we add as a general principle that we would have construed the statute to conform to that interpretation." Mass., 360 N.E.2d 288, 292.

reconstrue the statute, is extended only to the Supreme Court. See n.5, ante. Secondly, we note that the Supreme Court's consistent view, most recently expressed in the case at bar, is that a statute may be construed to render it constitutional only when it is "susceptible" to that construction. 428 U.S. 147, 96 S. Ct. 2866. We should have thought that "susceptible" means that the proposed interpretation is one possible meaning of an ambiguous provision. Even there, "[t]he rule of construction to be invoked when constitutional problems lurk in an ambiguous statute does not permit disregard of what [the legislature] commands." United States v. UAW, 1957, 352 U.S. 567, 589, 77 S. Ct. 529, 540, 1 L.Ed.2d 563. The problem may be more complex, but we cannot believe that we have jurisdiction, by way of injunction or otherwise, to direct a state superior court judge to interpret and apply a

state statute in a manner contrary not merely to its "explicit" terms, Mass., 360 N.E.2d 288, 294 but to the present interpretation of the Massachusetts court. Ibid. We must reject defendants' proffer of legislative power.

JULIAN, Senior District Judge  
(dissenting on motion to stay).

This action was brought as a class action to enjoin as unconstitutional on its face the enforcement of Mass. G.L. c. 112, § 12P. On April 28, 1975, this Court, in a divided decision, declared unconstitutional the parental consent requirement to a minor's abortion and permanently enjoined the enforcement of the statute. Subsequently, on July 1, 1976, the Supreme Court of the United States vacated the judgment of this

Court, holding "that the District Court should have certified to the Supreme Judicial Court of Massachusetts appropriate questions concerning the meaning of § 12P and the procedure it imposes." Bellotti v. Baird, 428 U.S. 132, 151, 96 S. Ct. 2857, 2868, 49 L.Ed.2d 844, 858 (1976). On July 30, 1976, the Honorable William J. Brennan, acting as Circuit Justice, issued an order temporarily restraining enforcement of the statute pending a final decision by the Supreme Judicial Court of Massachusetts. On January 25, 1977, the Supreme Judicial Court rendered an opinion which comprehensively answered each of the nine questions certified by this Court. In its opinion the Supreme Judicial Court stated that it would wait twenty days before certifying an attested copy of its decision to this Court. Thus the stay previously granted by Justice Brennan

was dissolved on February 14, 1977, when the certified opinion of the Supreme Judicial Court was received by the clerk of this Court.

A preliminary injunction will issue only upon a showing that the plaintiffs have a substantial likelihood of prevailing ultimately on the merits and that, absent the preliminary injunctive relief, the plaintiffs will suffer irreparable harm. The plaintiffs have the burden of proving the existence of both these facts. Automatic Radio Mfg. Co. v. Ford Motor Co., 390 F.2d 113 (1 Cir. 1968), cert. denied, 391 U.S. 914, 88 S. Ct. 1807, 20 L.Ed.2d 653 (1968). The majority, however, shifted the burden to the defendant to prove that a preliminary injunction should not issue. By stating that it refuses to "assume the point in issue," (p. 855 of majority opinion), namely, the constitutionality of the statute, the

majority has in fact assumed that the statute is unconstitutional. The presumption of constitutionality of statutes (Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364, 93 S. Ct. 1001, 35 L.Ed.2d 351 (1973); McGowan v. Maryland, 366 U.S. 420, 425, 81 S. Ct. 1101, 6 L.Ed.2d 393 (1961); 16 C.J.S. Constitutional Law § 99) applies to Mass. G.L. c. 112, § 12P. The United States Supreme Court in Bellotti v. Baird, 428 U.S. 132, 96 S. Ct. 2857, 49 L.Ed.2d 844 (1976) has vacated this Court's ruling that the statute in question is unconstitutional. The burden of proving that the statute as construed by the Supreme Judicial Court is unconstitutional rests upon the plaintiffs.

The majority relies on three arguments to justify staying the enforcement of Mass. G.L. c. 112, § 12P. First it contends that the

statute is silent regarding the standard to be used by parents in determining whether or not to consent and that Massachusetts parents may be unaware of the Supreme Judicial Court's construction of the statute. This contention is clearly without merit. It is an established rule of law that a state court's interpretation of its own state statutes is binding on the federal courts. See Hortonville Joint School Dist. No. 1 v. Hortonville Educ. Ass., 426 U.S. 482, 487, 96 S. Ct. 2308, 2312, 49 L.Ed.2d 1, 7 (1976); Mullaney v. Wilbur, 421 U.S. 684, 691, 95 S. Ct. 1881, 44 L.Ed.2d 508 (1975); Kingsley Picture Corp. v. Regents, 360 U.S. 684, 688, 79 S. Ct. 1362, 3 L.Ed.2d 1512 (1959). The majority opinion points out that a "statute may be construed to render it constitutional only when it is 'susceptible' to that construction."

(P. 857 of majority opinion.) This Court, however, is precluded from holding that Mass. G.L. c. 112, § 12P, is not susceptible to a constitutional construction, because the United States Supreme Court itself, in Bellotti v. Baird, supra, expressly found that the statute is susceptible to a constitutional interpretation:

"It is sufficient that the statute is susceptible to the interpretation offered by appellants, and we so find . . ."

Id., 428 U.S. at 148, 96 S. Ct. at 2866, 49 L.Ed.2d at 856 (emphasis supplied). The Supreme Court's holding is binding upon this Court.

Furthermore, a state court's construction of its own state statutes is deemed to be notice to all concerned of what the statute provides. See Broadrick v. Oklahoma,

413 U.S. 601, 613, 93 S. Ct. 2908, 37 L.Ed.2d 830 (1973) (by implication). It is not essential to the statute's validity or binding force that the standard be spelled out in the text of the statute itself. It is legally sufficient if it is articulated in the opinion of the state's highest court which construes the statute. It is quite clear from the Supreme Judicial Court's answer to question 1 (Baird v. Attorney General, Mass., 360 N.E.2d 288, at 292 n. 4), which was certified by this Court, that the parent when considering whether or not to grant consent is to consider exclusively what will serve the child's best interest.

Furthermore, the Supreme Judicial Court enjoins upon the judges of the Superior Court (Baird v. Attorney General, Mass. 360 N.E.2d 288, page 293) that they must "disregard all parental objections, and other

considerations, which are not based exclusively on what would serve the minor's best interests." Id., at 293. There is no reason to suppose that the Superior Court judges of this Commonwealth would be unaware of the proper standard by which to review a minor's petition under Mass. G.L. c. 112, § 12P.

A second reason relied upon by the majority for granting the stay is that by imposing a mandatory requirement of consultation between the minor and her parents, the Supreme Judicial Court has ". . . diminished the only feature of the statute that could save it from the Court's ruling in Danforth." (P. 856 of majority opinion.) The majority misreads Danforth. In Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 96 S. Ct. 2831, 49 L.Ed.2d 788 (1976), the United States Supreme Court struck down the parental consent provision of a

Missouri statute because it purported to delegate an absolute veto power to the parents. The Massachusetts statute as construed does not create any such absolute power. Therefore, it is most unlikely that the Massachusetts statute would be declared unconstitutional for the reasons which invalidated the Missouri statute.

The majority (on pp. 856-857, majority opinion) purports to give a third reason for granting the stay. After several readings of the opinion, however, it is still unclear to me what that third reason might be.

Finally, without considering any of the defendant's contentions that the stay might cause irreparable harm to Massachusetts minors, the majority reaches a finding that absent the preliminary injunctive relief, the plaintiffs would suffer irreparable harm. I fail to see how the enforcement of Mass. G.L. c. 112,

§ 12P, could conceivably result in any harm or injury - irreparable or otherwise - to any of the plaintiffs.

Where is the harm to members of the plaintiff class of Massachusetts minors? If the parents consent to an abortion, as well they might, then no harm would inure to the minor desiring to terminate her pregnancy. If the parents withhold consent but a Superior Court judge determines that an abortion would be in the minor's best interest, then she may have an abortion, and she would suffer no harm. Surely, requiring the minor to comply with minimal legal procedures, though perhaps inconvenient, or even unpleasant, does not constitute irreparable harm or injury to the minor. Only in the instance where the minor's parents and a state judge concur that an abortion would not be in the best interest of the adolescent girl would she be precluded from

having an abortion. Certainly enforcement of a state statute which prevents a minor from undergoing a surgical procedure which is found by both her parents and the Court to be contrary to her own best interests, cannot sensibly be said to cause her irreparable harm.

Where is the harm to Baird or to Dr. Zupnick? Baird's only conceivable harm is a possible diminution of income which might result from the loss of business of some minors who forego having abortions, or who decide under parental guidance to have the operation at a facility other than Baird's. The only harm which can possibly inure to Dr. Zupnick would similarly entail only a loss of income. These financial losses, which would certainly not be ruinous to Baird's business or to Dr. Zupnick's professional career, cannot be considered irreparable.

On the contrary, the harm that is inflicted on the minor and her parents by staying the enforcement of Mass. G.L. c. 112, § 12P, is permanent and grave. A pregnant unmarried minor is likely to be in an emotional turmoil:

"All experts agreed that pregnancy in an unmarried minor is a period of great emotional stress; . . ."

Baird v. Bellotti, 393 F. Supp. 847, 853 (D. Mass. 1975) (Aldrich, J.). She may well be confused and unable to decide what to do.

"We find quite credible defendants' expert who testified that at certain periods of their lives adolescents might react maturely one day and immaturely the next."

Id., at 854, n. 9.

It is undisputed that she would profit from parental support and

guidance at this critical juncture in her life.

"All experts agreed that . . . support is needed, and that parental support, if forthcoming, is most desirable. Probably most parents are supportive."

Id., at 853.

Yet, by staying the enforcement of this statute, a Massachusetts minor who has an abortion without consulting with her parents will be deprived of the counsel, guidance and support which her parents could have provided for her at a critical period in her life and to which she is entitled as a matter of state law. She may be left without guidance to choose among a variety of abortion facilities, unregulated and unsupervised by public or other independent authority.

"The greatest divergence in the testimony related to the capacity of minors to give [sic] an informed consent. At one extreme, Baird testified that in his many years experience he had never met a minor who was incapable, a conclusion supportable only on a hypothesis, which we reject, that an abortion, if not medically contra-indicated, is always the best solution, so that a minor who wants one must be presumed capable."

Id., at 854. (Footnotes omitted.)

Corresponding to the child's need for parental protection and guidance, the parents have a

legal<sup>1</sup> and moral obligation to provide for and protect their child. As the majority finds in their earlier opinion, most parents would wish to know of their child's condition, so that they could discharge their parental obligations.

". . . From the standpoint of parents, we believe that most would wish to know of their daughter's pregnancy, and we may assume that most would seek to be supportive."

Id., at 853.

Yet, by staying the enforcement of this statute, information of their child's condition may be kept from them, and they may be deprived

permanently of the opportunity of fulfilling, for the benefit of their minor daughter, the parental obligations which they owe her.

The action of this Court staying the enforcement of Mass. G.L. c. 112, § 12P, removes for an indefinite period the only legal barrier in this state against the exploitation of pregnant adolescents by operators of unregulated and unsupervised abortion facilities who may be motivated by concerns which are far removed from the minor's own best interest. The stay granted by the majority is legally unjustified and does not serve the best interest of either the minor or the public.

I respectfully dissent.

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<sup>1</sup> See laws both decisional and statutory cited in fn. 17, Baird v. Bellotti, 393 F. Supp. 847, 864 (dissenting opinion).

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

WILLIAM BAIRD; MARY MOE;  
PARENTS AID SOCIETY, INC.;  
GERALD ZUPNICK, M.D.; and all  
others similarly situated,

Plaintiffs,

v.

FRANCIS X. BELLOTTI, Attorney General  
of the Commonwealth of Massachusetts;  
GARRETT BYRNE, District Attorney of the  
County of Suffolk; the District Attorneys  
for all other Counties, their agents, successors,  
those acting in concert with them, and all others  
similarly situated,

Defendants,

JANE HUNERWADEL,  
Defendant-Intervenor.

CIVIL ACTION  
No. 74-4992-F

Opinion.

May 2, 1978.

Before ALDRICH, Senior Circuit Judge, JULIAN, Senior  
District Judge, and FREEDMAN, District Judge.

ALDRICH, Senior Circuit Judge.

INTRODUCTION

This is the third time that this class action involving the constitutionality of a Massachusetts statute defining procedures that must be followed before a minor can obtain an abortion,<sup>1</sup> has required a full opinion.<sup>2</sup> It has been extensively prepared and briefed. Defendants<sup>3</sup> commence their most recent brief with this statement.

"With the exception of the Watergate scandal and the Viet Nam war, no issue has divided the country and its

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<sup>1</sup>The entire statute has been printed in other opinions. The section presently pertinent is Mass. G.L. c. 112, § 12S.

"(1) If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother.

"If one of the parents has died or has deserted his or her family, consent by the remaining parent is sufficient. If both parents have died or have deserted their family, consent of the mother's guardian or other person having duties similar to a guardian, or any person who had assumed the care and custody of the mother is sufficient."

\*For our prior opinions enjoining the statute's operation, see *Baird v. Bellotti*, D.Mass. 1975, 393 F.Supp. 847, (*Baird I.*) *Baird v. Bellotti*, D.Mass., 1977, 428 F.Supp. 854, (*Baird II.*) *Baird I* contains many basic facts, including identification of the plaintiffs, standing, and justiciability, not repeated herein.

<sup>3</sup>Defendants are Francis X. Bellotti, Attorney General of the Commonwealth, and the District Attorneys of the several Massachusetts counties. Jane Hunerwadel, mother of minor daughters, was permitted to intervene as the representative of parents of Massachusetts minors who might wish to obtain abortions without parental knowledge or consent. In addition, we accepted Planned Parenthood League of Massachusetts, Crittenden Hastings Clinic, and Preterm, in a status something more than amici because of reservations about the adequacy of plaintiffs' representation.

governmental officials more dramatically than the debate over the propriety of physicians' performing procedures to induce the termination of pregnancies, or as they are commonly referred to, abortions. The sparks of this controversy have fallen on all levels of government and flamed into judicial conflagrations involving additional and difficult issues of federalism, the legal process, and the relations among the state, the family, and the family's individual members."

Although we might question how far the Watergate scandal divided the country, and we are unaware of any body of judicial disagreements warranting the description of conflagrations, we agree with the rest of this statement. We do not construe it as an admonition directed to our personal conduct. However, we do accept it as a guide for ourselves in choosing the path we should tread. At the same time, we believe that the Massachusetts legislature should govern itself with the same understanding. When dealing with relatively unimportant and uncontroversial matters the state can paint with a broad brush. When entering an area of highly cherished rights and principles, where the sparks, to use defendants' word, are charged because of basic, conflicting and deeply held beliefs, the state should proceed with corresponding care. We do not find that it has done so. Nor do we agree with defendants that this is a case of parties seeking relief for overbreadth improperly affecting others, not before the court. Cf. *Young v. American Mini Theatres, Inc.*, 1976, 427 U.S. 50, 59; *Broadrick v. Oklahoma*, 1973, 413 U.S. 601. Plaintiffs are asserting defects in their own right.

The first question is what the statute means. Basically, it requires a minor under 18, unless married, widowed or divorced, who desires an abortion, to obtain the written consent

of both parents, unless available, and failing that, the approval of a judge of the superior court, upon a finding of "good cause." Although there are some additional questions, there were three principal areas of disagreement as to the more precise statutory meaning; the right of parents, in withholding consent, to consider interests other than the minor's, i.e., their own, and that of the family as a whole (parents' rights); the power of the court to order an abortion without the parents' knowledge in appropriate instances (parents' bypass); the power of the court to override the informed consent of a mature minor (judicial override). At the original hearing defendants and all members of the court agreed that the statute recognized parents rights as well as the minor's, and forbade any parent bypass. Our dissenting brother felt, mistakenly, as it turned out, that the informed consent of a mature minor could not be overridden by the superior court. The court majority considered the statute unconstitutional in any event, and rejected his suggestion that we refer its meaning to the Massachusetts Supreme Judicial Court.

On appeal to the Supreme Court defendants changed their position in a number of respects. They abandoned parents' rights; they asserted that parents must regard only the minor's interests in considering whether to consent, and asserted, further, that the statute permitted court proceedings without the parents' knowledge if in the minor's best interests. Finally, they agreed with our dissenting brother that the statute recognized the mature minor rule and that there could be no judicial override in such event. The Supreme Court, without reaching the constitutional questions, but on the basis of the Massachusetts Attorney General's interpretation, which, it said, deserved special consideration, 428 U.S. at 143, stated that, so read, the Massachusetts statute might differ fundamentally from the Missouri statute struck down in *Planned Parenthood of Central Missouri v. Danforth*, 1976, 428 U.S. 52. Accord-

ingly, it instructed us to refer the matter of construction to the Massachusetts court. *Bellotti v. Baird*, 1976, 428 U.S. 132.

Hypothesizing the interpretation that defendants urged upon it, the Supreme Court said,

"The picture thus painted by the respective appellants is of a statute that prefers parental consultation and consent, but that permits a mature minor capable of giving informed consent to obtain, without undue burden, an order permitting the abortion without parental consultation, and, further, permits even a minor incapable of giving informed consent to obtain an order without parental consultation where there is a showing that the abortion would be in her best interests. The statute, as thus read, would be fundamentally different from a statute that creates a 'parental veto.'" 428 U.S. at 145.<sup>4</sup>

In other words, the Court envisaged a mature minor rule, with no power in the superior court to override, and which permitted parents' bypass altogether if the court found an informed consent, and even as to an immature minor if the court found that an abortion without her parents' knowledge would be in her best interests.

Pursuant to our instructions, we certified nine questions to the Massachusetts court and, in the meantime, continued the stay of the statute's enforcement. *Baird II*. Thereafter we received our answers. *Baird v. Attorney General*, 1977 Mass.

<sup>4</sup>In referring to *Baird* in *Maher v. Roe*, 1977, 432 U.S. 464, 473, the Court omitted part of the material in this paragraph. Defendants contend that by so doing the Court has limited the *Baird* decision and, consequently, the issues before us. We cannot think *Baird* was intended to be overruled or modified by an abbreviated summary, and we mention this point only because of the stress defendants lay upon it.

A. 3. 96, 360 N.E.2d 288. The Massachusetts court there rejected the concept of parents' rights, holding the parents may consider only the minor's personal interests in deciding whether to consent. However, the court also construed the statute to be in some respects radically different from that envisaged by the Supreme Court. The court held that there could be no parents' bypass in any case. Further, it held that the statute eliminated abortions altogether from the mature minor rule. We address the constitutional issues raised by those holdings in that order.

1. *Parents' Bypass: The statute's absolute requirement of parental notification.*

The Massachusetts court determined that the legislature was "explicit in stating that a judge should pass on an application for a consent order only after one or both parents have declined to consent to the abortion." 360 N.E.2d at 294. Faced with the loss of this alleviating feature, defendants now take the position that there are not enough cases calling for an exception to mandatory consultations.<sup>5</sup>

Defendants commence with a number of mistaken assumptions. In the first place, they apparently misread the language of the Supreme Court's opinion, quoted ante, and think the Court was contemplating parents' bypass only when there was affirmative proof that this would be in the minor's best interests. We read the Court's language as indicating it understood defendants' contention to be that bypass would be

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<sup>5</sup>Alternatively, defendants contend that "the proper decision would determine that the statute is valid on its face and leave for individual or aggregate 'as applied' litigation the resolution of problems affecting individual 'mature minors.'" We regard this argument as specious. Unless we act, the statute will have to be "applied" by the superior court as the Massachusetts court has held it is to be applied, *viz.*, by refusing to take jurisdiction until the parents have been notified.

in order in every case that the superior court found informed consent by a mature minor. The evidence warrants our findings that many, perhaps a large majority of 17-year olds are capable of informed consent, as are a not insubstantial number of 16-year olds, and some even younger.

In addition, the Court recognized that even if incapable of informed consent, it may be to a minor's best interest that the hearing be held, and the abortion be performed, without her parents' knowledge. The immature minor may be, in fact, the least capable of dealing with a hostile family situation. We reject defendants' singular contention that the issue of immature minors is not before us.\*

Finally, in an apparent attempt to minimize the importance of the statute's defects, defendants' post-trial brief contains a graphic diagram prepared by counsel, divided into trimesters, and again subdivided, from which they conclude that plaintiffs' total complaint relates to only "one-twenty-fourth of the situations which the statute encompasses." Not only does this fractionalization disregard the points just made, but it overlooks the fact that a minor's possible need of an abortion without her parents' knowledge is not limited to the first trimester. However, even were the issues confined to the first trimester, the great majority of abortions occur in the earlier months. Defendants' giving equal numerical weight to each trimester is fanciful.

Coming to the merits, and passing for the moment the separate issue of mature minors, there are a variety of recognized reasons why it would be to a minor's best interests for

\*Defendants also contend that plaintiffs waived the subject of immature minors. It is not clear that they did so, but, if they did, it was a breach of their duty as representatives of the classes that at least Dr. Zupnick purported to represent, and we are not bound thereby. It was for such reasons that we gave special stature to the parties we would ordinarily have considered only amici.

one or both of her parents to be kept in ignorance of her pregnancy. Parents, physically or emotionally unwell, may be injured by the shock, thus causing the minor deep feelings of guilt. Some parents are child abusers; others at least may become actively hostile on such disclosure. Defendants concede, and the evidence shows, that an appreciable number of parents are not supportive. These include not only those who would inflict physical harm, but parents who would insist on an undesired marriage, or on continuance of the pregnancy as punishment. We may suspect, in addition, that there are parents who would obstruct, and perhaps altogether prevent, the minor's right to go to court. This would seem but a normal reaction of persons who hold strong anti-abortion convictions.

The Massachusetts court conceded that there is no penalty for improperly withheld consent. From the parents' standpoint, the court was correct, but from the minor's manifestly it is not. We begin with the testimony of defendants' expert that a substantial number of minors would refuse to consult with their parents under any circumstances. Assuming, however, that they did consult and that the parents improperly refused to consent, the penalty borne by the minor — the burden of seeking a court order — is a heavy one. Plaintiffs' expert credibly and without contradiction testified that court proceedings over such a personal matter, even if conducted in the most benign manner, would be "severely detrimental to a teenager, particularly since she had just met with her parents' disapproval, which is difficult enough." Further, she credibly testified that many minors would not go to court, especially if it had to be against her parents, but rather would resort to illegal and frequently dangerous abortions. But assuming again in the statute's favor that the minor would initiate the proceedings, defendants' own expert expressed the opinion that if she did go to court and was successful, it would be likely

to destroy what was left of the family relationship.<sup>7</sup> The minor, accordingly, is in a no-win situation. If she loses the judicial proceedings, it will be a personal blow, and scarcely a redemption of the ill feeling and tension that undoubtedly resulted from her parents' refusal of consent and her taking them to court. If she wins, according to defendants' own expert she is likely to find herself in an even worse position.

On this basis plaintiffs contend with some persuasiveness that the entire concept of a court proceeding to remedy the unconstitutionality of the parental veto, as struck down in *Danforth*, is but an *ignis fatuus*, and itself imposes too great a burden upon the exercise of the minor's rights. We do not reach this issue, but we do hold that it is an improper burden in those cases where a court, if given free rein, would find that it was to the minor's best interests that one or both of her parents not be informed, but is forbidden by the statute to make this decision. In remanding the case to us the Supreme Court said,

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<sup>7</sup> "It seems to me that when affairs have reached this point where the relationship between the parents and the child have become a courtroom issue that I would have a lot of misgivings about the validity of the relationship between the parents and the child and how capable they are of being valid support for this child in the future.

"The consequences, if the decision was made in favor of the child, for quality family relationships are not good. The need for support on the part of the child would be abandoned at this point and the child would be abandoned at this point and her need for support would be great . . . ."

This last sentence may have been inartistically expressed, or inaccurately transcribed, but, however it was said, we reject defendants' contention that their witness made "clear it is not judicial intervention but rather the underlying family crisis which prompts his dim prognosis." To the contrary, it is apparent that he felt a judicial proceeding, particularly if successful, might be the final blow.

"We do not accept appellees' assertion that the Supreme Judicial Court of Massachusetts inevitably will interpret the statute as to . . . require the superior court to act other than in the best interests of the minor . . . ." 428 U.S. at 147.

However, in reading the statute as requiring parental notification in every instance, the Massachusetts court has done precisely that.

Defendants would answer this by claiming that this defect is not "real and substantial," *Young v. American Mini Theatres, Inc.*, ante, 427 U.S. at 80, or "substantial . . . in relation to the statute's plainly legitimate sweep," *Broadrick v. Oklahoma*, ante, 413 U.S. at 615. However, in another connection, but equally applicable here, their brief refers to "legislative recognition of the unfortunate fact that parents are not always supportive of their pregnant daughters and may, the evidence suggests infrequently, refuse to consent to the performance of abortion surgery although the surgery is in their child's best interests, or mistreat her in other ways." If there is legislative recognition of this unfortunate fact in one connection, there is no reason why there should not be in another. In terms of the direct concern of this statute, the exact number of minors who are injured is unimportant. Particularly is this so when there is no practical reason for not protecting them. Practicality, in some cases, may justify overbreadth, but since, under the Massachusetts court's holding, the superior court in any event must determine the minor's best interests in the light of all her personal circumstances, it opens no new areas to inquire into her family situation.

We add that it is peculiarly incorrect, and inappropriate, for defendants to express alarm by saying that "plaintiffs' overbreadth claim is an unwarranted use of an engine of destruc-

tion whose acceptance would destroy the entire statute." If the statute is overbroad because it fails to protect the interests which are its sole justification, there is a simple solution — the legislature can remedy the defect.

We cannot leave this matter without commenting briefly on the superlatives that intervenor Hunerwadel attached to the value of requiring parental notification in order to obtain parental support, and to permit parental guidance. We in no way minimize the importance of these matters.<sup>8</sup> Parents have many years, however, to offer guidance, and to indicate support. However surprised an individual parent may be to find a daughter pregnant, given the present high incidence of teenage pregnancy the possibility seems too great for concerned parents to disregard until it happens. If the family relationship is such that communication has not been attempted, or successful, before the pregnancy, we agree with the expert who doubted the efficacy of a last-minute, state-compelled consultation. What is more important, if the minor, too, doubts it, a statute that requires her to go to her parents as a precondition to going to court will not tie her hands. Rather, it will lead her to the illegal abortionists that defendants rightly decry, or to other dangerous activity. The minor may, of course, be mistaken, but we do not believe the answer to this is a judicial proceeding preconditioned on her finding out, for the die has then been cast.

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<sup>8</sup>We also note that Justice White's opinion in *Danforth* referred to parental consent as "the traditional way by which States have sought to protect children from their own immature and improvident decisions." 428 U.S. at 95. The Justice was speaking, however, in terms of a statute under which parents made the final decision. Where there is to be a judicial determination, it would be counter-productive to include the parents when the court finds that their knowledge and presence would be detrimental.

## 2. *Judicial Override: The mature minor and unequal protection.*

Not only under this statute must every minor, irrespective of her achievement of maturity sufficient to reach an informed consent, notify her parents and seek their consent before going to court, but she must submit to the court's decision if it does not conform to her own. Defendants represented to the Supreme Court that Massachusetts recognized the mature minor rule and that if the court found an informed consent, it would proceed to issue the order. The Massachusetts court held that defendants had misread the statute; that Massachusetts did have the mature minor rule, but that the statute rejected it with respect to abortions. It went on to state that, but for the statute, the mature minor rule would permit an informed consent "where the best interests of a minor will be served by not notifying . . . her parents." 360 N.E.2d at 296. Thus the statute not only requires the parents to be notified, but deprives the minor of the right to decide even when the court has found her mature and that her decision was informed. Instead, the state, acting through the judge, substitutes its own view. It does so even in light of the testimony, which we credit, that in addition to the loss of her rights, it is a highly traumatic experience for a mature minor to be refused a desired abortion.

A minor has a basic constitutional right to an abortion. *Roe v. Wade*, ante; *Carey v. Population Services International*, 1977, 431 U.S. 678, 692-94; *Planned Parenthood of Central Missouri v. Danforth*, ante, 428 U.S. at 74-75. The state's power to limit this right should extend only to protect the minor from the special consequences of her minority — immaturity, and the lack of informed understanding. Instead, the statute imposes upon the minor the very disability which has been found not to exist, and does so uniquely in the area in which the Court has determined she has constitutional rights.

An account of the Massachusetts law as to mature minors is fully set forth in the opinion of the Massachusetts court, and need not be repeated. Except for sterilization, a far more serious and far-reaching procedure, abortion is the only form of surgery to which a mature minor may not consent, although the evidence shows that many other forms are far more complicated and dangerous. Defendants, in dwelling upon the dangers of abortion, proceed as if the only issue were to abort or not to abort, neglecting the fact that the choice necessarily involves a further alternative. The evidence fully supports the conclusion stated in *Roe v. Wade*, ante, 410 U.S. at 149, that continued pregnancy and child-birth involve greater risks than a properly performed first trimester abortion. Nor are we speaking only as to physical dangers. The same comparative findings with respect to abortion as against continued pregnancy apply to the psychological risks as to the physical. We find no reasonable basis for Massachusetts distinguishing between a minor and an adult, given a finding of maturity and informed consent.<sup>9</sup> Even the Massachusetts court stated that this is an area particularly appropriate for the mature minor rule. 380 N.E.2d at 296. We regard the legislative exception to be both an undue burden in the due process sense, and a discriminatory denial of equal protection.

### 3. Formal overbreadth.

Not only has the statute, with the exception of parents' rights, been found to possess none of the features which defendants persuaded the Court might distinguish it from the Missouri statute condemned in *Danforth*, but we believe it improperly suggests the existence of parents' rights. Defendants,

<sup>9</sup>Nor, parenthetically, has any reason been advanced for attaching to abortion the special requirement of dual consent by both parents. Rather, this provision seems a further manifestation of our originally found intent to recognize parents' rights.

realizing that extending rights to parents that may conflict with a minor's own interest was improper under *Roe v. Wade*, abandoned the position that the statute recognized them in their arguments before the Supreme Court and the Massachusetts court, and the latter, pursuant to the need to construe the statute constitutionally, accepted that construction. We agree with our dissenting brother that, generally, a limiting construction of an otherwise unconstitutional state statute by a state court is read into the statute, and can save it, if the construction itself is constitutional. In this case, however, involving as it does a most sensitive area, where the statute will be read, and applied, primarily by laymen, we think that a limiting judicial construction is insufficient to cure the impermissible chill which its excessively broad language creates. It is only reasonable to anticipate that many parents, accustomed to think in terms of parents' rights, will find them included for the very reasons originally argued by the defendants and accepted by us. Clearly they will do so if they are unaware of the limitations which the court read into the statute. We do not share our brother's optimism that every parent who knows of the statute will be equally cognizant of the court's interpretation. Such knowledge is a legal presumption, not a factual one. Moreover, it is likely that some, even if aware of the court's opinion, will choose the language of the legislature over judicial limitations they regard as an unwarranted usurpation. We may take judicial notice, from public reaction we have seen to *Roe v. Wade*, that an appreciable segment of the public holds such views.

In light of the very heavy burden that the statutorily required judicial proceeding imposes upon a minor, we regard it essential that the limited scope of the issue confronting parents, when considering whether to consent, be brought home as forcefully, and precisely, as possible, to minimize the incidence of improper refusals. Since there is no justification

for the statute's failure to do this, the shadow it casts is an undue burden upon the minor's rights. See *Maher v. Roe*, ante, 432 U.S. at 473; *Bellotti v. Baird*, ante, 428 U.S. at 147. Arguably, it is a welcomed shadow. Whatever may have been the legislature's original intent, we observe that it re-enacted the statute, without amendment, in 1977 Mass. Acts ch. 397, not only after the Supreme Court had indicated what might pass constitutional muster, but after the Massachusetts court had disclosed this apparent overbreadth, and we had commented, in *Baird II*, on its chilling effect. The statute is a prominent public issue, and we cannot think the legislature was unaware of its judicial course. Under these circumstances it may be thought that the legislature prefers the chilling effect rather than to have the statute expressed in "terms that the ordinary person exercising ordinary common sense can sufficiently understand." *United States Civil Service Commission v. National Ass'n of Letter Carriers*, 1973, 413 U.S. 548, 569. This, in turn, evokes the statement of the Court in *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 1977, 429 U.S. 252, 265-66, "When there is proof that a discriminatory purpose has been a motivating factor in the decision, . . . judicial deference is no longer justified." This response seems particularly warranted when the overbreadth serves no other purpose.

#### JUDICIAL REPAIR.

The Massachusetts court, although recognizing that its function was to construe the statute and not to determine its constitutionality, did read a substantial limitation into a portion of the language in an effort to make the parental consent provision constitutional. The court did not, however, read into the statute the exceptions the Supreme Court had indi-

cated would make a fundamental difference and might save it from constitutional infirmity. Instead, in these respects it read the statute the other way, but purported to give it a chameleon-like ability to adjust to whatever color should ultimately be necessary to protect it. While saying that the statute "is explicit in stating that a judge should pass on an application . . . only after one or both parents have declined to consent," 360 N.E.2d at 294, nonetheless this requirement is subject to alteration.

"If the Supreme Court concludes that we have impermissibly assigned a greater role to the parents than we should or that we have otherwise burdened the minor's choice unconstitutionally, we add as a general principle that we would have construed the statute to conform to that interpretation." *Id.* at 292.

"[The statute] must be construed to require as much parental consultation as is permissible constitutionally. In such a situation, the judge will have to determine whether circumstances exist which make prior parental consultation impermissible constitutionally." *Id.* at 294-95.

How the judge is to have the opportunity to make such a determination, much less how a minor seeking an order will know he can do so, in the face of explicit language saying he cannot, the court did not explain.

Again, the court said,

"The Legislature has left no room to apply a mature minor rule where an unmarried minor seeks an abortion without parental consultation." *Id.* at 294.

However, this, too, can be changed, "[if] a contrary conclusion is compelled constitutionally." *Id.* at 293.

This perceived adaptability presents a number of problems. It is commonly said that a statute is to be given a constitutional construction "if fairly possible," *Crowell v. Benson*, 1932, 285 U.S. 22, 62, "when a limiting construction . . . could be placed," *Broadrick v. Oklahoma*, ante, 413 U.S. at 613. Here something more is involved than construing language. The Massachusetts court, in addition to contradicting its specific terms, suggests reading into the statute affirmative provisions made out of nothing but a generally announced purpose to pass constitutional muster.<sup>10</sup> In so doing, the court seems to have found the ultimate remedy for all constitutional infirmities. If a statute which, in terms, requires parental consultation without exception, can be "construed to require as much parental consultation as is permissible constitutionally," here, at once, is an instant cure, both for overbreadth, and for lack of standards. Regardless of whether a statute says too much, or too little, so long as the legislature intended it to be constitutional, when it comes before a court it will be appropriately rewritten. With due respect, we cannot believe this to be possible. *Cf. United States v. Reese*, 1875, 92 U.S. 214, 221.

The situation is even more undesirable. Although the statute is not ours, the Massachusetts court has, in effect, given us the coloring-book. The Supreme Court remanded the case for construction by the Massachusetts court because "in the absence of an authoritative construction, it is impossible to define precisely the constitutional question presented." 428 U.S. at 148. Now, apparently, the question supplies the answers. This is an approach which, so far as we can ascertain, is

<sup>10</sup> Although the Massachusetts court, and the defendants, speak of severability, such action is not severance. Severability is a process of striking out, not of insertion or rewriting. See *United States v. Reese*, 1875, 92 U.S. 214, 221.

unique. While it is ultimately, of course, for the Supreme Court, we must doubt our authority to fix terms of a state statute contrary to the *prima facie* interpretation given it by the state court. See *United States v. Thirty-seven Photographs*, 1971, 402 U.S. 363, 369.

We reaffirm our decision that the statute is unconstitutional and is to be permanently enjoined. Plaintiffs are entitled to costs, including recovery of costs paid as a result of the previous appeal, lost because of defendants' mistaken advocacy.

BAILEY ALDRICH,  
U.S. Circuit Judge.

FRANK H. FREEDMAN,  
U.S. District Judge.

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JULIAN, Senior District Judge (dissenting):

After the first trial the majority of this three-judge court held Mass. G.L. c. 112, § 12P unconstitutional because of its requirement of parental consent to a minor's abortion and permanently enjoined the defendants from enforcing it "in any fashion."

I dissented. The majority and dissenting opinions are reported in 393 F.Supp. 847, at pages 849 and 857 respectively.

The defendants appealed. The Supreme Court vacated the judgment of the District Court and remanded the cases<sup>1</sup> for proceedings consistent with the Supreme Court's opinion holding that the District Court should have certified to the Supreme Judicial Court of Massachusetts (hereinafter SJC) ap-

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<sup>1</sup> *Bellotti v. Baird*, No. 75-73, together with the companion case, *Hunerwadel v. Baird*, No. 75-109; 428 U.S. 132 (1976).

propriate questions concerning the meaning of section 12P and the procedure it imposes.

The District Court accordingly certified nine questions to the SJC which, after hearing arguments of counsel, answered all nine questions in an opinion filed January 25, 1977. *Baird v. Attorney General*, \_\_\_ Mass. \_\_\_, 360 N.E.2d 288.

This District Court thereafter held further hearings and received additional evidence, arguments and briefs in the case.

The District Court remains divided on the issue of the constitutionality of the statute as construed by the SJC in its answers to this Court's questions. The same two judges who had invalidated the statute have now reaffirmed their original decision and have held that section 12P (now section 12S) even as construed by the SJC is unconstitutional and ordered that enforcement of the statute be permanently enjoined.

I again dissent from their decision. I would hold the statute constitutionally valid except that part which as construed by the SJC in its answer to question 2(b) vests in the superior court judge the power to withhold consent to the abortion even though he finds that the minor "is capable of making, and has made, an informed and reasonable decision to have an abortion" but further "determines that the best interests of the minor will not be served by an abortion." *Id.*, at 293.

In 1974 the Massachusetts Legislature adopted Stat. 1974, c. 706, entitled, "An Act to protect unborn children and maternal health within present constitutional limits." Section 12P of that Act reads as follows:

"(1) If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a

hearing will not require the appointment of a guardian for the mother.

"If one of the parents has died or has deserted his or her family, consent by the remaining parent is sufficient. If both parents have died or have deserted their family, consent of the mother's guardian or other person having duties similar to a guardian, or any person who had assumed the care and custody of the mother is sufficient."

"(2) The commissioner of public health shall prescribe a written form for such consent. Such form shall be signed by the proper person or persons and given to the physician performing the abortion who shall maintain it in his permanent files.

"Nothing in this section shall be construed as abolishing or limiting any common law rights of any other person or persons relative to consent to the performance of an abortion for purposes of any civil action or any injunctive relief under section 12R."

The nine questions certified to the SJC and its answers are as follows:

"1. What standards, if any, does the statute establish for a parent to apply when considering whether or not to grant consent?

"a) Is the parent to consider 'exclusively . . . what will serve the child's best interest'?

"b) If the parent is not limited to considering exclusively the minor's best interests, can the parent take into consideration the 'long-term consequences to the family and her parents' marriage relationship'?

"c) Other?"

The SJC gave this answer (360 N.E.2d at p. 292):

"This question concerns the standard which should be applied by a parent in deciding whether to consent to an abortion for his or her unmarried daughter. The statute provides no explicit standard. . . . In light of the Court's opinion in *Planned Parenthood of Cent. Mo. v. Danforth* [428 U.S. 52 (1976)] abrogating an absolute parental veto, we construe § 12P so as to avoid any constitutional question, as far as possible, and answer that the parent is to consider 'exclusively . . . what will serve the child's best interest.' We thus answer question 1(a) in the affirmative and need not answer questions 1(b) and 1(c)."

"2. What standard or standards is the superior court to apply?

"a) Is the superior court to disregard all parental objections that are not based exclusively on what would serve the minor's best interests?

"b) If the superior court finds that the minor is capable, and has, in fact, made and adhered to, an informed and reasonable decision to have an abortion, may the court refuse its consent based on a finding that a parent's, or its own, contrary decision is a better one?

"c) Other?"

The SJC answered as follows (360 N.E.2d at page 293):

"Section 12P provides that if one or both of the minor's parents refuse consent, 'consent may be obtained by order of a judge of the superior court for good cause shown . . . .' Here there is a statutory standard of 'good

cause.' The second question inquires concerning the role of the judge in applying the 'good cause' standard. We think it clear, answering question 2(a), that the same considerations referred to in answering question 1 must be applied by a judge of the Superior Court. He must disregard all parental objections, and other considerations, which are not based exclusively on what would serve the minor's best interests. . . . '[G]ood cause' means that the judge may give consent to an abortion where it is shown that, in spite of the disapproval of one or both parents, the best interests of the minor will be served if the abortion is performed. In granting consent, the judge, of course, may impose reasonable conditions which will protect those best interests."

Answering question 2(b), the SJC stated:

"Unless a contrary conclusion is compelled constitutionally, we do not view the judge's role as limited to a determination that the minor is capable of making, and has made, an informed and reasonable decision to have an abortion. Certainly the judge must make a determination of those circumstances, but, if the statutory role of the judge to determine the best interests of the minor is to be carried out, he must make a finding on the basis of all relevant views presented to him. We suspect that the judge will give great weight to the minor's determination, if informed and reasonable, but in circumstances where he determines that the best interests of the minor will not be served by an abortion, the judge's determination should prevail, assuming that his conclusion is supported by the evidence and adequate findings of fact."

"3. Does Massachusetts law permit a minor (a) 'capable of giving informed consent,' or (b) 'incapable of giving informed consent,' 'to obtain [a court] order without parental consultation'?"

The SJC answered (360 N.E.2d at 296) that

"parental consultation for an abortion is required by statute in all cases, other than in an emergency or where there is no parent (or the equivalent) available."

"4. If the court answers any of question 3 in the affirmative, may the superior court, for good cause shown, enter an order authorizing an abortion, (a), without prior notification to the parents, and (b), without subsequent notification?"

The SJC answered (360 N.E.2d at 297) that

"if they are available, the parents of a minor must be notified of any proceeding brought by her to obtain judicial consent to an abortion and will be entitled to participate . . . We say that, apart from constitutional restraints, notification to the parents of the judicial proceeding, in advance if possible, is required, and thus we answer question 4 in the negative. We recognize that there may be instances in which the parents are unavailable and the judge must act. In such a case, consultation is impossible, but subsequent notification of the proceeding may not be. Unless barred by constitutional considerations, notification of a minor's parents concerning judicial proceedings is required."

"5. Will the Supreme Judicial Court prescribe a set of procedures to implement c. 112, § 12P which will expedite the application, hearing, and decision phases of the superior court proceeding provided thereunder? Appeal?"

The SJC answers the first portion of question 5 in the affirmative (360 N.E.2d at pp. 297-298):

"Prompt resolution of a § 12P proceeding may be expected. On any court day, hardly any person in the Commonwealth [of Mass.] is more than one or two hours' travel from a court house where a Superior Court judge is available to process an application under § 12P. The proceeding need not be brought in the minor's name and steps may be taken, by impoundment or otherwise, to preserve confidentiality as to the minor and her parents."

The SJC details the procedures available to expedite the proceedings:

"At each stage, a record of the proceedings will be preserved."

With reference to the second portion of question 5, which concerns the prospect of expeditious appeals, the SJC states that it had

"no question concerning the speedy disposition of any appeal."

"6. To what degree do the standards and procedures set forth in c. 112, § 12F (Stat. 1975, c. 564), authorizing minors to give consent to medical and dental care in specified circumstances, parallel the grounds and procedures for showing good cause under c. 112, § 12P?"

The SJC answered as follows (360 N.E.2d at p. 300):

"The grounds for consenting to an abortion under § 12P, which we have defined as the best interests of the minor, are not different from the standards to be applied in determining whether some other medical procedure should be performed on a minor pursuant to § 12F. In each instance, a physician must exercise his or her medical judgment and the minor must consent to the procedure as being in his or her best interests. The difference between § 12P, concerning an abortion, and § 12F, concerning other medical operations, lies in the procedures which must be followed in arriving at the conclusion that the particular operation will be in the best interests of the minor. Under § 12F, a married, widowed, or divorced minor may consent to any and all medical services without the intervention of either his or her parents or of a court. Thus, the requirements of § 12P concerning parental or judicial approval of an abortion are inapplicable to such minors. All other minors described in § 12F seeking abortions must pursue the procedures of § 12P, although they are free to consent to any other medical procedure (except sterilization) without the involvement of their parents or of a judge. Minors not described in § 12F have only their common law rights to consent to medical services, except as expanded or limited by statute."

"7. May a minor, upon a showing of indigency, have court-appointed counsel?"

The SJC answered this question as follows (360 N.E.2d at p. 301):

"If a judge of the Superior Court determines that the best interest of an indigent minor would be served by the appointment of counsel to represent the minor, the court has the power to appoint counsel for the minor to assist her in the assertion of her constitutional rights. . . . If the mere existence of the 'burden' of seeking judicial consent to an abortion is not constitutionally onerous (and apparently these plaintiffs have not yet so claimed in the District Court), the circumstances that an indigent minor may have counsel appointed for her lightens the 'burden' and tends to make the requirement more acceptable constitutionally. . . . In order to avoid a constitutional question concerning the burden on the assertion of a minor's constitutional rights which would arise from a contrary interpretation, we construe the statutes of the Commonwealth to authorize the appointment of counsel of a guardian ad litem for an indigent minor at public expense, if necessary, if the judge, in his discretion, concludes that the best interests of the minor would be served by such an appointment."

"8. Is it a defense to his criminal prosecution, if a physician performs an abortion solely with the minor's own, valid, consent, that he reasonably, and in good

faith, though erroneously, believed that she was eighteen or more years old or had been married?"<sup>1</sup>

The SJC answered question 8 in the affirmative (*id.*, at p. 302):

"The fifth paragraph of § 12F . . . provides such a protection to a physician. Although § 12F is not concerned primarily with abortion procedures, the Legislature did not except abortions from the broad grant of protection of the fifth paragraph of that section, as it did exempt abortions from certain other provisions of § 12F. . . . A construction of § 12F which would not extend to physicians performing abortions the same protection extended to physicians performing other operations would raise a constitutional question which we avoid by the construction of § 12F which we have adopted."

"9. Will the Court make any other comments about the statute which, in its opinion, might assist us in determining whether it infringes the United States Constitution?"

The SJC points out that Rule 3:21 of that Court, which sets forth the certification procedure, "contemplates that only questions of law will be certified. Question 9 is not a question of law." The SJC, however, takes the opportunity under question 9 to comment on "the consequences of a determina-

<sup>1</sup>The SJC commented (n. 21, *id.*, at p. 302):

"The word 'valid' may not be an appropriate one in the context of the question."

tion that the differing procedures of § 12P and § 12F, as interpreted by us apart from the impact of constitutional considerations, do not survive an equal protection of the laws challenge." *Id.*, pp. 302, 303.

It is clear that the statute as construed by the SJC is designed to assure parental, and, if necessary, judicial involvement in the pregnant minor's decision to have an abortion. The magnitude, seriousness, and urgency of the problem of teenage pregnancy and its consequences are generally acknowledged.<sup>2</sup> The Massachusetts Legislature had the power within the con-

<sup>2</sup>"Adolescents in the United States have rates of childbearing that are among the world's highest." From plaintiffs' Exh. 2 ("11 Million Teenagers") at page 7.

"There are about 21 million young people in the United States between the ages of 15 and 19 years. Of these, more than half — some 11 million — are estimated to have had sexual intercourse — almost seven million young men, and four million young women. In addition, one-fifth of the eight million 13- and 14-year-old boys and girls are believed to have had intercourse." *Id.*, at page 9.

"Each year, more than one million 15-19-year-olds become pregnant, one-tenth of all women in this age group. (Two-thirds of these pregnancies are conceived out of wedlock.) In addition, some 30,000 girls younger than 15 get pregnant annually. . . . Of the additional 30,000 pregnancies experienced by girls younger than 15, 45 percent were terminated by abortion . . ." *Id.*, at page 10.

As of June 1976 there were approximately the following numbers of female adolescents residing in Massachusetts by age:

Ages 10, 11 and 12	166,500
Ages 13 and 14	113,500
Ages 15, 16 and 17	174,000
<b>TOTAL</b>	<b>454,000</b>

(Derived from answer to defendants' Request for Admission No. 1 under Rule 36, F.R.Civ.P.)

stitutional limits to enact legislation it reasonably believed would tend to alleviate the problem in Massachusetts.

The majority rely on three arguments to hold the statute unconstitutional in its entirety. One of these arguments is that the statute's failure to inform parents that they must consider only the best interests of the minor in deciding whether to consent to their daughter's abortion constitutes a heavy burden on the exercise of her right to have an abortion because she would have to go to court in case of "an improper refusal of consent."<sup>4</sup>

<sup>4</sup>The majority are of the opinion that an improper parental refusal will impose on the minor the burden of going to court or the burden of seeking alternatives to a legitimate abortion. With regard to minors seeking alternatives to a legitimate abortion, the plaintiffs' witness admitted that it is impossible to have data on that. (Oct. 18, 1977, Tr. at 106.) The majority accept plaintiffs' testimony that court proceedings would be severely detrimental to a teenager although the plaintiffs' expert admitted that she had never been to court with any of her minor patients and that she had been involved in fewer than five courtroom proceedings of any fashion. (Oct. 18, 1977, Tr. at pp. 100, 101.) A court appearance in this case was apparently not viewed as burdensome to Mary Moe I, the only minor who appeared before the court, since she "voluntarily participated" in the action. *Baird v. Bellotti*, 393 F.Supp. 847, 850, n. 5.

The majority opinion contains this statement (p. 8): "We begin with the testimony of defendants' expert that a substantial number of minors would refuse to consult with their parents under any circumstances." The defendants' expert's testimony, however, was as follows (Oct. 18, 1977, Tr. at 148):

"Q. How about a pregnant adolescent? Do you have an opinion as to the extent to which a pregnant adolescent would be reluctant to discuss the matter of that pregnancy with her parents?

"A. I don't know what it is you are trying to get me to say. I would qualify your question by saying that at first contact adolescent girls are reluctant to discuss it with their parents.

"Q. Is it fair to say that with careful counselling a great number of those would then discuss it with their parents?

"A. Yes.

"Q. But there would still be a substantial number who would be reluctant to do so?

"A. Yes, sir."

Parents, however, are not without notice of the standard to apply in deciding whether to consent to their daughter's abortion. The SJC's construction of the statute explicitly sets out the standard to be used: "the parent is to consider 'exclusively . . . what will serve the child's best interest.'" *Baird v. Attorney General*, 360 N.E.2d 288, 292 (1977). A construction by the state's highest court fixes the meaning of the statute. The "state interpretation is as though written into the ordinance itself," *Poulos v. New Hampshire*, 345 U.S. 395, 402 (1953); it "puts these words in the statute as definitely as if it had been so amended by the legislature." *Winters v. New York*, 333 U.S. 507, 514 (1948). See *N.A.A.C.P. v. Button*, 371 U.S. 415, 432 (1963); *Commonwealth v. Richards*, \_\_ Mass. \_\_\_, 340 N.E.2d 892, 894 (1976). A state court construction of a statute is notice to all concerned of what the statute provides. See *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973) (by implication).

The majority anticipate that many parents will mistakenly find parents' rights included in the language of the statute, but

Although the Supreme Court in *Bellotti v. Baird* did not reach the issue of whether a court hearing would be an impermissible burden on a minor's rights, of the five justices who held the parental consent requirements unconstitutional in *Planned Parenthood, infra*, two indicated that they would approve of a statute which contained provisions for a court proceeding. "[A] materially different constitutional issue would be presented under a provision requiring parental consent or consultation in most cases but providing for prompt (i) judicial resolution of any disagreement between the parent and the minor, or (ii) judicial determination that the minor is mature enough to give an informed consent without parental concurrence or that abortion in any event is in the minor's best interest." *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 91 (1976) (Stewart, J., with Powell, J.).

This court has already ruled that for purposes of this facial attack the question of burdensome court procedures is a non-issue. "[W]e rule now that we will conclusively assume, for the purposes of our decision, utmost speed, diligence, and proper procedure and consideration, including protection of privacy by the Superior Court and an Appellate Court." (Apr. 13, 1977, Hearing Tr. at p. 3.)

they give no reason for assuming that many parents will be familiar with the language of the statute and not assuming the same familiarity with the SJC's construction of the statute. If we are to assume that many parents are sufficiently informed to have knowledge of the exact language of the statute, it is reasonable to assume that they would also be informed of the statute's construction.<sup>5</sup> In any case, the construction of the statute is now part of the law and it is a general rule of law that all persons are presumed to have notice of all that the law contains. The statute as construed unequivocally states that parents are to consider only the minor's best interests. It is hard to imagine how this could be stated more clearly.

The majority attribute to the Legislature the deliberate intent to make the statutory language imprecise because the 1977 re-enactment of the statute failed to spell out the standard for parental consent defined by the SJC. This argument appears to be wholly without merit. The purpose of the 1977 re-enactment was to make corrective changes in the numbering of the sections of the statute. At the same time of the original enactment of the statute on abortion, there were already in existence statutory sections with the same numbering as the abortion sections. See *Bellotti v. Baird*, 428 U.S. 132, 134, n. 1. In 1977 the Legislature merely corrected this duplication by enacting the statute with different numerical designations. No changes in substance were made. In view of the purpose of the re-enactment, the majority finding that the Legislature "welcomed" imprecision is inaccurate. In fact, if any intention regarding the meaning of the statute is to be attributed to the Legislature's re-enactment, it must be that the Legislature intended the judicial construction to be part of the statute. "It is a well settled rule of statutory interpretation

<sup>5</sup>On vital issues, such as those relating to abortion and adolescents, decisions of the SJC have substantially the same dissemination and publicity as legislative enactments.

that, when a statute after having been construed by the courts is re-enacted without material change, the Legislature are presumed to have adopted the judicial construction put upon it." *Nichols v. Vaughan*, 217 Mass. 548, 551 (1914); *Commonwealth v. Benoit*, 346 Mass. 294, 297 (1963); *Lorillard v. Pons*, 46 U.S.L.W. 4150, 4151 (U.S. Feb. 22, 1978). Thus, the statute contains legally sufficient notice that parents are to consider only the best interests of their child.

Another reason relied upon by the majority in holding the statute unconstitutional is that the statute has an absolute requirement of parental notification and that there are reasons why it could be in a minor's best interests for her parents to be kept in ignorance of her pregnancy. The majority found that the exact number of minors who are injured by this requirement is unimportant. However, the evidence does indicate that the cases where parental notification may not be in a minor's best interests are exceptional and of rare occurrence.<sup>6</sup> Plaintiffs' expert estimated that in her practice parental consultation is "objectively contraindicated"<sup>7</sup> only about 5 to 10 percent of the time. (Oct. 18, 1977, Tr. at p. 103; Deposition of Dr. Nadelson at I-41.) Another plaintiffs' experts, commenting on how "extremely important" parental involvement is, noted that "there is the *rare* case where it is impossible to

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<sup>6</sup>In their opinion the majority point out that the defendants concede that an appreciable number of parents are not supportive and that these include parents who would inflict physical harm, insist on an undesired marriage or continuance of pregnancy as punishment. This impression of parental behavior which the majority creates fails to note the limitation in the concession made by the defendants. Defendants stated that an "appreciable number" means only that such parents exist. The defendants made no admission as to the frequency of occurrence of this phenomenon. (Defendants' Responses to Plaintiffs' Requests for Admission, ¶ 7.)

<sup>7</sup>"Objectively contraindicated" was used by the witness to mean that the witness, as a doctor, would agree that parental consultation is contraindicated. (Oct. 18, 1977, Tr. at 102.)

obtain." (Dec. 7, 1974, Tr. at 67.) (Emphasis added.) The "usual situation" is that the minor's fears of telling her parents are not realized, and if the minor's fears were taken at face value and her parents not involved, she and her family would have lost the benefit of parental involvement. (Dec. 30, 1974, Tr. at 77, 123.) The majority in the case at bar assumed in their first opinion that most parents would seek to be supportive of their minor daughters. 393 F.Supp. 847, 853 (D. Mass. 1975). The evidence shows that in the great majority of cases parental involvement will be in the minor's best interest. The statute should be "judged by reference to characteristics typical of the affected classes rather than by focusing on selected, atypical examples." *Califano v. Jobst*, 46 U.S.L.W. 4004, 4007 (U.S. Nov. 8, 1977). In this case, according to plaintiffs' own testimony, the typical, "run of the mill" situation is that a minor's fears about involving her parents are not realized. (Dec. 30, 1974, Tr. at 77.) Since in the majority of cases the statute will operate to protect minors from the consequences of decisions which they are not capable of making alone,<sup>8</sup> an imputation of unsupportive parental behavior in a concededly small number of cases<sup>9</sup> should not be held to out-

<sup>8</sup> Plaintiffs admit that: the abortion decision-making process is the most difficult aspect of the experience for the girl (Plaintiffs' Responses to Defendants' Requests for Admissions, ¶ 67); an adolescent lacks experience with her feelings and does not have the emotional control of an adult (*id.*, ¶ 53); ambivalence is especially prominent among adolescents (*id.*, ¶ 58); a period of intense anxiety and ambivalence is often experienced in the twenty-four hours prior to an abortion (*id.*, ¶ 57); a pregnant adolescent is "a child potentially bearing a child" (*id.*, ¶ 59); and the girl who makes her decision in collaboration with her parents seems the best prepared (*id.*, ¶ 67).

<sup>9</sup> In note 5 of their opinion the majority reject the defendants' argument that in those exceptional cases where parental involvement may not be in the minor's best interests, an "as applied" proceeding would be the proper method to resolve the problem. In my view the defendants' argument is valid. This court would have jurisdiction over questions of the constitutional

weigh the beneficial effects provided by the statute for the majority of minors.

The majority also express doubt of the "efficacy" of "last minute" parental consultation, reasoning that parents have many years to guide their children, and if communication has not been established before pregnancy, "last minute" consultation will not be beneficial. This reasoning is not persuasive. Does the majority perhaps attribute greater efficacy to a "last minute" consultation at an abortion facility, such as occurred in the case at bar?<sup>10</sup> Is it not far more likely that the

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permissibility of specific applications of the statute and in "as applied" proceedings could determine whether the statutory requirement of parental involvement is constitutionally permissible. In such proceedings the court would have concrete facts before it and the benefit of arguments of counsel to enable it to focus on the problem.

<sup>10</sup> December 31, 1974, Testimony of Mary Moe I:

"Q. (by Mr. LUCAS) When did you first contact Parents Aid Society?  
"A. About five minutes after I found out I was pregnant.  
"Q. And do you recall with whom you talked?  
"A. To Marilyn.  
"Q. About how long?  
"A. About ten minutes.  
"Q. Did you make an appointment at that time?  
"A. Yes, I did.  
"Q. Did she promise they would do an abortion on you at that time?  
"A. Yes, she did.  
"Q. Did she tell you you would have to have counseling first?  
"A. She explained the whole thing to me on the phone. They also explained at the Women's Health Clinic. They had counseling and different things like that. She explained that I would go to counseling and they would perform the abortion, and it would take about five minutes, and I would go in the recovery room. She just briefly described it and when I came in, you know, they would go into more detail.  
"Q. Did she tell you you would see a doctor at any time?  
"A. Yes, Dr. Zupnick, who performed the abortion.

pregnant adolescent would find more concerned guidance and care at the hands of her parents and the family physician? The majority fail to recognize the value of providing parents with the opportunity to consult with their minor children at the time that the children are faced with the necessity of making important decisions. They would appear to require that parents anticipate the variety of situations that may confront their children and prepare them in advance to deal with any problem that may arise during the course of the child's minority. However, a "last minute" opportunity may be the parents' only opportunity to offer guidance and assistance to their daughter on her abortion decision. Although good communication is established between parent and child, communication on the particular subject of abortion may not arise in the absence of an actual pregnancy experience. Even where parents have previously discussed their views on abortion with their children, the parents should not be denied the opportunity to counsel and assist their daughter in her real-life abortion problem if it actually arises. Communication at

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"Q. Did she indicate when you talked to her they would definitely perform the abortion?

"A. Yes, before November 1st.

"Q. Did she place any conditions on what she said? Did she indicate you had to meet with the doctor first, for example?

"A. No, she didn't.

"Q. Did they have any difficulty scheduling you before November 1st?

"A. Well, she told me right then they would schedule me but they weren't sure about the time and everything because they had to get it in before November 1st.

"Q. Was it difficult for you to come in as early as you did?

"A. I wanted it, yes, like for a week later, because it would have been more convenient. (Transcript at 137, 138.)

On the procedure actually followed at the abortion facility of the plaintiffs in the case at bar, see also n. 8 of the dissenting opinion *Baird v. Bellotti*, 393 F.Supp. 847, at pp. 859-860.

such time would be of the utmost importance. See *Doe v. Irwin*, 441 F.Supp. 1247, 1252-1253 (W.D. Mich. 1977). The deep interest and concern that parents naturally have in the welfare of their children constitute a human resource of great value and its utilization should be encouraged. It is common sense to assume that many pregnant minors would be reluctant to confront their parents with their pregnancy. The majority have raised that reluctance to constitutional status by giving the minor the right to conceal her pregnancy from her parents. This action not only encourages concealment and deception within the family unit, but also wastes vast and valuable parental resources.

In addition to proving directly beneficial to the pregnant minor, the statute's requirement of parental notification also provides assistance to others who may have a role in the minor's abortion decision. In those cases where a superior court judge is asked to consent to a minor's abortion, parental participation in the judicial proceeding will make available to the judge information on the minor's medical, social and emotional background which would be important for him to know in arriving at reliable findings on the degree of the minor's maturity, and the reasonableness of her decision. The SJC has ruled that the statutory standard for a judicial order granting consent to a minor's abortion is the best interest of the minor. To carry out his role in determining the best interests of the minor, a judge must have knowledge of all the relevant circumstances in the minor's life. A minor's parents are the persons who normally have the most knowledge of the many aspects of their daughter's life and their input in a judicial proceeding may well supply the judge with valuable information in determining what is in the minor's best interests. Also, if counsel is appointed for the minor in the judicial proceeding, counsel's access to the minor's parents and the knowledge they have of her background may result in providing the minor with more effective representation.

A third reason advanced by the majority for striking down the entire statute is that the statute permits a superior court judge to override an "informed and reasonable decision to have an abortion" made by a pregnant minor whom the judge has found to be capable of making such a decision. I would hold the part of the statute which authorizes a judge to override the minor's decision in such a case constitutionally invalid. In *Roe v. Wade*, the Supreme Court held that a woman's constitutional right of privacy includes the right to decide whether or not to terminate her pregnancy. 410 U.S. 113, 153-154 (1973). In *Planned Parenthood*, the Court extended this privacy right to minors and held that "the State may not impose a blanket provision . . . requiring the consent of a parent or person in loco parentis as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy." 428 U.S. at 74. These two cases establish that the state does not have the constitutional authority to delegate to a judge the power to unconditionally prohibit a mature minor, capable of making an informed abortion decision, from terminating her pregnancy. Under the Constitution as construed in *Roe* and *Planned Parenthood*, the state itself lacks the power to interpose an unconditional veto to the abortion decision of a mature minor and her physician.

In *Planned Parenthood*, however, the Court further stated (at p. 75):

"We emphasize that our holding that § 3 (4) [absolute requirement of parental consent] is invalid does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy [citing *Bellotti v. Baird*, decided on the same day]. The fault with § 3 (4) is that it imposes a special-consent provision, exercisable by a person other than the woman and her physician, as a prerequisite to a minor's termination

of her pregnancy and does so without a sufficient justification for the restriction. . . ."

Mr. Justice Stewart, with whom Mr. Justice Powell joined, concurring with the Court, noted (at pp. 90-91):

"With respect to the state law's requirement of parental consent, § 3 (4), I think it clear that its primary constitutional deficiency lies in its imposition of an absolute limitation on the minor's right to obtain an abortion. The Court's opinion today in *Bellotti v. Baird*, post, [428 U.S.] at 132, 147-148, suggests that a materially different constitutional issue would be presented under a provision requiring parental consent or consultation in most cases but providing for prompt (i) judicial resolution of any disagreement between the parent and the minor, or (ii) judicial determination that the minor is mature enough to give an informed consent without parental concurrence or that abortion in any event is in the minor's best interest. Such a provision would not impose parental approval as an absolute condition upon the minor's right but would assure in most instances consultation between the parent and child. (Footnote omitted.)

"There can be little doubt that the State furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support. It seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place." (Footnote omitted.)

In note 1 on page 91, Mr. Justice Stewart referred to the opinion of Mr. Justice Stevens (*id.*, pp. 102-105) concurring in part and dissenting in part, for some of the considerations that support the State's interest in encouraging parental consent.

Under the SJC's construction of the statute, a judge may disregard a minor's informed and reasonable decision if he determines that an abortion is not in her best interests. 360 N.E.2d at p. 293. Under that interpretation, a minor's decision may be found to be both informed and reasonable and still not be in her best interests. I fail to see how a minor's decision found to be truly informed and reasonable can at the same time be found to be contrary to the minor's best interests. The provision vesting in the judge the power to override a minor's "informed and reasonable decision" because it is not in her best interest would appear to be self-contradictory and incapable of rational application. If the judge found the minor's decision not to be in her best interests, how could he consistently find it to be reasonable? The lack of any ascertainable principle to guide a judge in differentiating between concepts of what is a reasonable and informed course for the minor to take and what course is in the minor's best interests leaves the resolution of the problem to the arbitrary will of the judge. I would strike the provision for judicial override and would limit the judge's role to a determination of whether the minor is capable of making the decision and whether her decision to have an abortion is informed and reasonable.

However, a statute invalid in part is not necessarily void in its entirety. The provision in the statute allowing a judicial override of a mature minor's informed consent may be severed from the statute.<sup>11</sup> The Supreme Court has firmly rejected "a

<sup>11</sup>The majority define severability as "a process of striking out," n. 10, and under this definition, striking out the provision for judicial override constitutes a severance. However, as stated by Mr. Justice Cardozo, "Severance does not depend upon the separation of the good from the bad by paragraph."

severability rule that required invalidation of an entire statute if any part of it was unconstitutionally overbroad, unless its different parts could be read as wholly independent provisions. . . . Consequently, we need not find . . . [a statute] constitutional in all its possible applications in order to uphold its facial constitutionality." *Griffin v. Breckenridge*, 403 U.S. 88, 104 (1971). "The general rule on separability, when part of a statute or some of its applications are declared to be constitutionally invalid is that the rest of the statute shall stand intact if the valid provisions or applications are capable of being given effect standing alone, and if the Legislature would have intended the statutes to stand with the invalid provisions stricken out." *Baird v. Davoren*, 346 F.Supp. 515, 522 (D. Mass. 1972). See *Buckley v. Valeo*, 424 U.S. 1, 108 (1976); Opinion of the Justices, 330 Mass. 713, 726 (1953). The final authority on whether or not a state law should be construed as severable is the state court. *Dorchy v. Kansas*, 264 U.S. 286, 290 (1924); *Stevens v. Campbell*, 332 F. Supp. 102, 107 (D. Mass. 1971). The Massachusetts Supreme Judicial Court has stated that it is clear "the Legislature intended to pass an act which was constitutionally acceptable and, even more important, to save as much of the statute's purpose as it could if any explicit statutory provision could not survive constitutional attack. Statute 1974, c. 706, § 2, provides that '[i]f any section, subsection, sentence or clause of this act is held to be unconstitutional, such holding shall not affect the remaining portions of this act.'" 360 N.E.2d at 291. (Emphasis added.) The SJC's finding of legislative intent is binding on us. In view of the language used, it cannot seriously be doubted that

or sentences in the text of the enactment. . . . The principle of division is not a principle of form. It is a principle of function." *People v. Knapp*, 230 N.Y. 48, 60, 129 N.E. 202, 207 (1920). Invalid applications, as well as invalid sentences or paragraphs, may be severed. *Loeb v. Columbia Township Trustees*, 179 U.S. 472, 490 (1900); *Griffin v. Breckenridge*, 403 U.S. 88, 104 (1971); *Doliner v. Town Clerk of Millis*, 343 Mass. 10, 15 (1961).

the Legislature would have intended the statute to stand with the invalid provision stricken. It is the expressed intention of both the Legislature and the SJC that as much of the statute as possible be saved. The invalidation of the entire statute would destroy a method of structuring the abortion decision designed to protect the very large and continuing class of pregnant minors.<sup>12</sup> By far the better course is to allow the law to operate where it can do so constitutionally, which, under the challenged statute, is in the great majority of the cases governed by it.

The severance of the judicial override will leave the essence of the statutory scheme intact. This is not an instance of judicial excision making the remainder of the statute difficult to interpret or apply. *Baird v. Eisenstadt*, 429 F.2d 1398, 1399 (1st Cir. 1970), *aff'd on other grounds*, 405 U.S. 438 (1972). The exclusion of the judicial override would leave the remainder of the statute entirely clear.

The majority also find that the statute constitutes a denial of equal protection in that it unreasonably distinguishes "between a minor and an adult, given a finding of maturity and informed consent." By striking the provision on judicial override, a minor who is found by a judge to be capable of a reasonable and informed consent will be treated as an adult and allowed to exercise her right to an abortion.

Plaintiffs contend that the statute denies equal protection in that it irrationally distinguishes between abortions and other

medical procedures because the mature minor rule<sup>13</sup> and Mass. G.L. c. 112, § 12F,<sup>14</sup> which allow certain minors to consent to medical procedures without parental involvement, are

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<sup>12</sup>"[W]here the best interests of a minor will be served by not notifying his or her parents of intended medical treatment and where the minor is capable of giving informed consent to that treatment, the mature minor rule applies in this Commonwealth." 360 N.E.2d at 296.

<sup>14</sup>Mass. G.L. c. 112, § 12F: "No physician, dentist or hospital shall be held liable for damages for failure to obtain consent of a parent, legal guardian, or other person having custody or control of a minor child, or of the spouse of a patient, to emergency examination and treatment, including blood transfusions, when delay in treatment will endanger the life, limb, or mental well-being of the patient."

"Any minor may give consent to his medical or dental care at the time such care is sought if (i) he is married, widowed, divorced; or (ii) he is the parent of a child, in which case he may also give consent to medical or dental care of the child; or (iii) he is a member of any of the armed forces; or (iv) she is pregnant or believes herself to be pregnant; or (v) he is living separate and apart from his parent or legal guardian, and is managing his own financial affairs; or (vi) he reasonably believes himself to be suffering from or to have come in contact with any disease defined as dangerous to the public health pursuant to section six of chapter one hundred and eleven; provided, however, that such minor may only consent to care which relates to the diagnosis or treatment of such disease."

"Consent shall not be granted under subparagraphs (ii) through (vi), inclusive, for abortion or sterilization."

"Consent given under this section shall not be subject to later disaffirmance because of minority. The consent of the parent or legal guardian shall not be required to authorize such care and, notwithstanding any other provisions of law, such parent or legal guardian shall not be liable for the payment for any care rendered pursuant to this section unless such parent or legal guardian has expressly agreed to pay for such care."

"No physician or dentist, nor any hospital, clinic or infirmary shall be liable, civilly and criminally, for not obtaining the consent of the parent or legal guardian to render medical or dental care to a minor, if, at the time such care was rendered, such person or facility: (i) relied in good faith upon the representations of such minor that he is legally able to consent to such treatment under this section; or (ii) relied in good faith upon the representations of such minor that he is over eighteen years of age."

"All information and records kept in connection with the medical or dental care of a minor who consents thereto in accordance with this section shall

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<sup>13</sup>The value to a minor of parental involvement in her abortion decision-making is not disputed. (See Plaintiffs' Responses to Defendants' Requests for Admissions, ¶ 67; Defendants' Responses to Plaintiffs' Requests for Admissions, ¶ 6; Dec. 7, 1974, Tr. at 27, 67; Dec. 30, 1974, Tr. at 9, 48, 75, 77, 86, 119, 131; Dec. 31, 1974, Tr. at 24; Jan. 28, 1975, Tr. at 18, 33, 49, 50.)

not applicable to abortions.<sup>15</sup> In *Bellotti v. Baird*, the Supreme Court stated: "As we hold today in Planned Parenthood, however, not all distinctions between abortion and other procedures is forbidden. . . . The constitutionality of such distinction will depend upon its degree and the justification for it." 428 U.S. at 149, 150.

The traditional rational basis test is to be used in testing any classifications made by the statute, since no suspect classification is involved, *Maher v. Roe*, 432 U.S. 464, 471 (1977), and a state need not establish a compelling interest for treating abortion differently from other medical procedures unless the state treatment is an unduly burdensome interference with a woman's freedom to decide whether or not to abort. *Id.*, at 473. A state's interest in its minor citizens may be furthered by placing regulations on a minor's conduct which might be impermissible if imposed on an adult. *Ginsberg v. New York*, 390 U.S. 629, 638-639 (1968). Section 12S (formerly § 12P), by requiring parental involvement in a minor's abortion decision, helps the minor to arrive at a decision that is in her best interests and does not preclude or unduly burden the exercise of her privacy rights.<sup>16</sup>

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be confidential between the minor and the physician or dentist, and shall not be released except upon the written consent of the minor or a proper judicial order. When the physician or dentist attending a minor reasonably believes the condition of said minor to be so serious that his life or limb is endangered, the physician or dentist shall notify the parents, legal guardian or foster parents of said condition and shall inform the minor of said notification."

<sup>15</sup>"Our discussion of the mature minor rule as to operations generally has no application to non-emergency abortions because parental consultation, if possible, is mandated by statute." 360 N.E.2d at 297.

Mass. G.L. c. 112, § 12F: "Consent shall not be granted under subparagraphs (ii) through (vi), inclusive, for abortion or sterilization."

<sup>16</sup>The Supreme Court has indicated that strict scrutiny is improper when reviewing statutes dealing with the privacy rights of minors and that state regulations inhibiting these rights are valid "if they serve 'any significant

Under the rational basis test the distinctions drawn by the statute must be rationally related to a constitutionally permissible purpose. *Maher v. Roe*, 432 U.S. at 478. The Massachusetts statute, section 12P (now § 12S), clearly satisfies this standard. In fact, the state interests furthered by the statute greatly exceed this minimal level and are also sufficient to withstand a test if heightened scrutiny.

The Supreme Court has already found that abortion differs significantly from other medical procedures. "The simple answer to the argument that similar requirements are not imposed for other medical procedures is that such procedures do not involve the termination of a potential human life."<sup>17</sup> *Maher v. Roe*, 432 U.S. at 480. This fundamental difference between abortion and other medical procedures is sufficient to justify separate treatment for the abortion decision. The

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state interest . . . that is not present in the case of an adult.'" *Carey v. Population Services International*, 431 U.S. 678, 693 (1977). "This test is apparently less rigorous than the 'compelling state interest' test applied to restrictions on the privacy rights of adults. . . . Such lesser scrutiny is appropriate both because of the States' greater latitude to regulate the conduct of children, *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Ginsberg v. New York*, 390 U.S. 629 (1968), and because the right of privacy implicated here is 'the interest in independence in making certain kinds of important decisions,' *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977), and the law has generally regarded minors as having a lesser capability for making important decisions. See, e.g., *Planned Parenthood*, 428 U.S., at 102 (STEVENS, J., concurring in part and dissenting in part)." *Id.*, at n. 15.

<sup>17</sup>A basic difference between abortion and other medical procedures was noted by plaintiffs' expert witness when she was asked to compare the psychological impact of an abortion with the impact of another medical procedure, such as a tonsillectomy. She testified that "they are really not comparable issues. . . . You are dealing with apples and oranges. They are not the same kind of thing. A tonsillectomy is a procedure that is done because you have something wrong . . . You have been sick. An abortion is something where you are not sick . . . a tonsillectomy is, basically, a non-controversial procedure which the doctor recommends and people generally go along with." (Deposition of Dr. Nadelson, I-30-33.)

state's compelling concern for the welfare of its minor citizens creates an additional interest justifying the statute since the state's interest in protecting the health and welfare of its adolescents is certainly a constitutionally permissible one. The statute aims at ensuring that a minor understands and takes seriously the message of pregnancy.<sup>18</sup> In providing a structure to minimize the possibility of improvident decisions with serious consequences, the statute furthers the state's important interest in protecting its young citizens. It is clear that abortion has psychological and emotional consequences which are unique and that decisions to abort involve considerations that are not present in decisions to undergo other medical procedures. Where minors are involved, the problems in making a decision to abort are intensified. See note 8, *supra*. Thus, the fundamental difference between abortion and other medical procedures and the state's compelling concern for its minor citizens justify separate consent requirements for a minor's abortion decision.

Plaintiffs also argue that the statute irrationally discriminates between unmarried and married, widowed or divorced minors. The distinction between married (or formerly married) and unmarried minors is not irrational. Married minors have left their parents' families to create a new family with new responsibilities; they have become emancipated and their parents are no longer legally responsible for them. See *Califano v. Jobst, supra*, at 4006. They have obtained parental consent to their marriage. Mass. G.L. c. 207,

<sup>18</sup>The evidence shows a high rate of recidivism of unwanted teenage pregnancies. See Plaintiffs' Responses to Defendants' Requests for Admissions, ¶ 37; Oct. 18, 1977, Trial Tr. at 95. Plaintiffs admit that "[f]or the adolescent, failure of resolution of the unwanted pregnancy crisis can potentially arrest development progress. The message of pregnancy must be understood and taken seriously if repetition is to be avoided." (Plaintiffs' Responses to Defendants' Requests for Admissions, ¶ 59; see also *id.*, ¶ 56.)

§ 7. A married minor's decision to abort does not affect her parents and their responsibility to her in the same way as does an unmarried minor's decision to abort. The statute simply recognizes that marriage alters the relationship between a minor and her parents.

The Legislature has enacted a statute which is designed to aid a pregnant minor in making a reasoned decision whether or not to terminate her pregnancy.<sup>19</sup> The statute logically selects the minor's parents as the appropriate persons to be given the opportunity in the first instance to guide their child, because they are the natural and legal guardians of the child. If the parents refuse consent, the state, through its courts, in its role of *parens patriae*, will be available to protect the minor's interests. With the severance of the provision for judicial override, where the minor has made an informed and reasonable decision, the judge will consent to her abortion. If she is found incapable of giving an informed consent, the judge will either grant or withhold consent depending on which course he finds on the evidence to be in the minor's best interests.

The importance of the parental role in the upbringing of children has been well established and repeatedly reaffirmed by the Supreme Court. *Myer v. Nebraska*, 262 U.S. 390, 399

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<sup>19</sup>The majority express disapproval of the "chameleon-like" statute which the SJC has construed to "require as much parental consultation as is permissible constitutionally." 360 N.E.2d at 294. The majority demand greater precision from the Legislature than can be reasonably expected in this area of the law. The Supreme Court has not yet defined the permissible scope of parental involvement in an unmarried minor's decision to seek an abortion. In view of the Legislature's attempt to obtain maximum parental input within constitutional limits, the element of flexibility in the SJC's construction is reasonable. Insisting that the Legislature enact a statute that is perfect from its inception and striking down any attempt that does not meet this standard, while refusing to give the Legislature any clear guidance on what would be permissible, does not appear to afford a better solution.

(1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Wisconsin v. Yoder*, 406 U.S. 205, 232-233 (1972); *Smith v. Organization of Foster Families*, 431 U.S. 816, 843-844 (1977); *Zablocki v. Redhail*, 46 U.S.L.W. 4093, 4096 (U.S. Jan. 18, 1978). Parental authority and the family unit have been constantly accorded constitutional protection because of legislative and judicial recognition that the family is fundamental in our society. *Ginsberg v. New York*, 390 U.S. 629, 639 (1968). *Moore v. East Cleveland*, 431 U.S. 494 (1977). "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." *Id.*, at 503-504.

Parents have rights and responsibilities that inhere in the parent-child relationship and stem from the fact, nature and purpose of parenthood. These rights and responsibilities are not inimical to the minor's rights and welfare. They exist for the benefit of the child and reflect the child's very real need for proper guidance and protection during the child's formative years. The state has a compelling interest in protecting the parental rights and duties against unauthorized intrusion by third persons. The statute under attack expresses this compelling interest.

The parental right to control, subject to constitutional limitations, the upbringing of children is a natural counterpart to the parental duty to support, guide and protect the child. The occurrence of pregnancy in a minor does not absolve her parents of responsibility to support, protect and guide their daughter, nor does it eliminate the daughter's need for parental support, protection and guidance. To the contrary, it is a period when parental assistance is urgent.

The state has a compelling interest in protecting and furthering the health and welfare of its minors.<sup>20</sup> It has done so in this statute by protecting them from undue outside influences and hasty, unreasoned decisions on abortions. This is a permissible exercise of state power and the statute is therefore constitutional.

For the reasons stated in this and in my previous<sup>21</sup> dissenting opinion, I would uphold the constitutionality of the statute.

ANTHONY JULIAN,  
U.S. Senior District Judge.

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<sup>20</sup>See the opinions in *Danforth* which comment on the state interests which justify legislation in this area:

STEWART, J., with POWELL, J.:

"There can be little doubt that the state furthers a constitutionally permissible end by encouraging an unmarried pregnant minor to seek the help and advice of her parents in making the very important decision whether or not to bear a child. That is a grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support." 428 U.S. at 91.

WHITE, J., with BURGER and RENQUIST, JJ.:

"The abortion decision is unquestionably important and has irrevocable consequences whichever way it is made. Missouri is entitled to protect the minor unmarried woman from making the decision in a way which is not in her own best interests." 428 U.S. at 95.

STEVENS, J.:

"The State's interest in protecting a young person from harm justifies the imposition of restraints on his or her freedom even though comparable restraints on adults would be constitutionally impermissible . . . [E]ven if it [the abortion decision] is the most important kind of a decision a young person may ever make, that assumption merely enhances the quality of the State's interest in maximizing the probability that the decision be made correctly and with full understanding of the consequences of either alternative." 428 U.S. at 102-103.

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<sup>21</sup>393 F.Supp. at p. 857.